No. 04-66
Vide 04-231

Title: Abdela Tum, et al., Petitioners

v.

Barber Foods, Inc., dba Barber Foods

Docketed: July 15, 2004
Lower Ct: United States Court of Appeals for the First Circuit
Case Nos.: (02-1679, 02-1739)
Decision Date: March 10, 2004

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
May 27 2004	Application (03A983) to extend the time to file a petition for a writ of certiorari from June 8, 2004 to July 8, 2004, submitted to Justice Souter.
May 28 2004	Application (03A983) granted by Justice Souter extending the time to file until July 8, 2004.
Jul 8 2004	Petition for a writ of certiorari filed. (Response due August 16, 2004)
Nov 23 2004	DISTRIBUTED for Conference of December 10, 2004.
Dec 2 2004	Response Requested . (Due January 3, 2005)
Jan 3 2005	Brief of respondent Barber Foods, Inc. in opposition filed.
Jan 18 2005	DISTRIBUTED for Conference of February 18, 2005.
Jan 21 2005	Reply of petitioners Abdela Tum, et al. filed. (Distributed)
Feb 22 2005	Petition GRANTED limited to Question 1presented by the petition and the following: "Do employees have a right to compensation for time they must spend waiting at required safety equipment distribution stations?". The case is consolidated with No. 03-1238 and a total of one hour is allotted for oral argument.
Mar 25 2005	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including May 9, 2005. VIDED.
May 2 2005	Further extension of time within which to file the joint appendix and petitioners' briefs on the merits to and including May 16, 2005. VIDED
May 16 2005	Brief amicus curiae of United States filed.
May 16 2005	Joint appendix filed.
May 16 2005	Brief of petitioners Abdela Tum, et al. filed.
May 16 2005	Brief amici curiae of National Employment Lawyers Association, et al. filed.
May 17 2005	Brief amicus curiae of AFL-CIO filed. VIDED.
May 23 2005	Extension of time within which to file respondents' briefs on the merits to and including July 13, 2005. VIDED
Jul 8 2005	Further extension of time within which to file respondent's brief on the merits to and including August 1, 2005.

Jul 13 2005	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioners
Jul 20 2005	CIRCULATED.
Jul 20 2005	SET FOR ARGUMENT on Monday, October 3, 2005.
Aug 1 2005	Brief amicus curiae of Chamber of Commerce of the United States, et al. filed. (Distributed)
Aug 1 2005	Brief amici curiae of National Chicken Council and American Meat Institute filed. (Distributed)
Aug 1 2005	Brief of respondent Barber Foods, Inc., dba Barber Foods filed. (Distributed)
Aug 2 2005	Record received from U.S.C.A. 1st Circuit. (1 box)
Aug 9 2005	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED
Aug 14 2005	Record received from U.S.D.C. for District of Maine. (1 box)
Aug 15 2005	Motion for divided argument filed by respondents Alvarez, et al. VIDED
Aug 15 2005	Motion for divided argument filed by IBP, Inc. and Barber Foods, Inc. (VIDED)
Sep 2 2005	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Sep 2 2005	Motion for divided argument filed by respondents Alvarez, et al, DENIED
Sep 2 2005	Motion for divided argument filed by IBP, Inc. and Barber Foods, Inc., DENIED
Sep 6 2005	Reply of petitioners Abdela Tum, et al. filed. (Distributed)
Oct 3 2005	Argued. For petitioner in 03-1238 and respondent in 04-66: Carter G. Phillips, Washington, D.C. For respondents in 03-1238 and petitioners in 04-66: Thomas C. Goldstein, Washington, D.C.; and Irving L. Gornstein, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

Abdela Tum, et al.,

Petitioners,

v.

Barber Foods, Inc., d/b/a Barber Foods.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is time employees must spend *walking* to and from stations where required safety equipment is distributed compensable under the Fair Labor Standards Act, as amended by the Portal-to-Portal Act? 29 U.S.C. 216(b), 254(a). (This is the first question presented by No. 03-1238, *IBP, Inc.* v. *Alvarez*.)

2. Do employees have a right to compensation for time they must spend waiting at required safety equipment distribution stations, and for time spent donning and doffing equipment that is necessitated by the employees' working conditions but not expressly required by the employer or by law?

3. Is this walking and waiting time rendered non-compensable merely because the associated compensable donning or doffing time is *de minimis* in isolation, even if the aggregate waiting, walking, donning, and doffing period is not *de minimis*?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following parties appeared below and are petitioners here: Nicholas Bearce, Allison Carey, Celso Florendo, Letecheal Hailu, Robert Huntley, Ken LeMarche, Ernest Levesque, Natalie Luongo, Paul Mason, Derso Mekonen, The Ngo, Tadeusz Olsyzynski, Joseph Raymond, Doug Robito, Najib Sayed, Laurie Secord, Kevin Snow, Evelyn Theunissen, Heidi Wallace, and Mintwab Yimam.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Abdela Tum, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (Pet. App. 1a-19a) is reported at 360 F.3d 184. The report and recommendation of the magistrate judge recommending partial summary judgment (Pet. App. 20a-48a), dated January 23, 2002, is unpublished. The district court's order adopting this report and recommendation (Pet. App. 49a-50a) is unpublished.

JURISDICTION

The judgment of the court of appeals on rehearing was entered on March 10, 2004. Justice Souter granted an extension of time for the filing of this petition on May 28, 2004. This court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

The relevant provision of the Fair Labor Standards Act, 29 U.S.C. 254(a), is reproduced at Pet. App. 51a.

STATEMENT OF THE CASE

This case presents issues closely related to those raised by No. 03-1238, *IBP, Inc.* v. *Alvarez et al.*, in which this Court has called for the views of the Solicitor General, 122 S. Ct. 2114 (May 3, 2004). The petitions for certiorari in this case and *Alvarez* should be granted, and the cases consolidated. Although the cases present some common questions, each also presents distinct and important issues on which the circuits are divided. By granting plenary review in both cases, the Court will provide needed guidance regarding the compensability of time associated with employees' donning and doffing of required safety equipment.

1. The petition for certiorari in *Alvarez* presents two questions. First, when time spent donning and doffing safety equipment is compensable work under the Fair Labor Standards Act (FLSA), 29 U.S.C. 216(b), is the time that employees spend *walking* to and from the stations where they are required to pick up that equipment also compensable? See *Alvarez* Pet. at i. Second, is the otherwise compensable time spent donning and doffing such equipment "clothes-changing time" within the meaning of FLSA Section 3(o), 29 U.S.C. 203(o), such that it can be deemed non-compensable according to the terms of a collective bargaining agreement? The second of these questions incorporates an issue of administrative law: the degree of deference owed to a Department of Labor opinion letter. See *Alvarez* Pet. at i.

This case presents, *inter alia*, the first of the two *Alvarez* questions. Indeed, the First Circuit's holding in this case created the circuit split with the Ninth Circuit's decision in *Alvarez*. See *Alvarez* Pet. at 12. This petition also raises three related issues meriting review that the *Alvarez* petitioner has not raised. First, is time spent *waiting* at (as opposed to *walking* to or from) equipment distribution stations compensable? Second, is donning and doffing time compensable even if the equipment is not formally required by the employer, but is necessitated by the nature of the job? Third, is walking and waiting time rendered non-compensable merely because the time spent donning and doffing the equipment is *de minimis* when taken in isolation, even if the aggregate donning, doffing, walking, or waiting time is more than *de minimis*?

2. The Fair Labor Standards Act (FLSA), 29 U.S.C. 216(b), requires employers to pay minimum and overtime wages for all hours statutorily defined as compensable work time. The Portal-to-Portal Act, 61 Stat. 86, which amended the FLSA, deemed non-compensable certain time spent on travel within workplace grounds as well as other activities that are "preliminary or postliminary" to the "principal activity or activities." 29 U.S.C. 254(a). Interpreting this Act, this Court has held that any pre- or post-shift activity that is an

"integral and indispensable part" of the principal work activity is compensable work, and that donning and doffing certain protective gear satisfies this criterion. *Steiner* v. *Mitchell*, 350 U.S. 247, 256 (1956). However, employers are not required to pay employees for otherwise "compensable" work time that is *de minimis* in length. See *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946).

3. Petitioners are hourly wage employees at respondent's poultry processing plant in Portland, Maine. Petitioners' work exposes them to hazardous machinery and tools, extreme cold related to poultry freezing operations, and toxic and caustic chemicals. Pursuant to USDA and plant rules, all employees of the plant are required to wear lab coats, hair nets, earplugs, and safety glasses on the production floor; depending on their job category, they may also be required to wear vinyl gloves, cotton glove liners, vinyl aprons, sleeve covers, bump hats, back belts, steel-toed boots, rain pants, steel mesh gloves, palletizing gloves, tool clips, set-up tools, hose nozzles, and lockout-tagout equipment. Some of these materials are distributed to employees at the plant's supply cage, others on racks or in bins down the hall from the supply cage, and others in tubs alongside the production floor.

Employees must wait in line at the supply cage for up to ten minutes to receive equipment, and then experience further delays at the racks and bins. They must also retrieve certain equipment from a locker room, creating additional delays. Because the hallways are very crowded at the beginning and end of each shift, navigating between the locations can be a slow process. All told, because employees are expected to be dressed and equipped for work when their shifts begin, they typically arrive between fifteen and thirty minutes early in order to accomplish these tasks; many employees have been ordered by their supervisors to do so. Doffing and depositing equipment in lockers, laundry bins, and trash cans at the end of the day takes substantial additional time and involves similarly slow navigation of the halls between multiple locations.

4. Petitioners filed this collective action suit under the FLSA, 29 U.S.C. 201 *et seq.* They allege that respondent unlawfully failed to compensate them for the time that they were required to spend obtaining, donning, doffing, and returning required protective clothing and equipment.

The district court granted respondent's motion for partial summary judgment on several grounds. It held that walking and waiting time, as well as time spent donning and doffing protective equipment not formally required by the employer or by law, was not compensable work time under the FLSA and the Portal-to-Portal Act. Pet. App. 33a-34a, 37a. The district court held that the time spent donning and doffing required equipment was compensable, however, and the case proceeded to trial. *Id.* 36a-37a. After the walking and waiting time and the donning and doffing of non-required equipment were excluded from the calculation, the jury found that the remaining amount of "donning and doffing" time, *standing alone*, was *de minimis*, and that petitioners were thus not entitled to compensation. Petitioners appealed.

The court of appeals affirmed. 331 F.3d 1. It subsequently vacated that judgment and granted petitioners' and the Secretary of Labor's request for panel rehearing, but rejected the Secretary's position and again affirmed the district court. Pet. App. 2a.

In holding that walking time was non-compensable under the Portal-to-Portal Act, the court of appeals rejected the Labor Department's view that, because the Act does not apply to activities performed during the workday, it cannot bar compensation for walking and waiting time that occurs after the first compensable activity – *e.g.*, the donning of protective gear – has triggered the beginning of the workday. Pet. App. 9a-10a. The court also interpreted the Labor Department regulation defining "principal activity," 29 C.F.R. 790.8, to exclude time spent waiting for required equipment even though, as the court conceded, the regulation does not expressly address the categorization of this waiting time and

even though – as the court failed even to mention – this interpretation flatly contradicted the Labor Department's reading of its own regulation. Pet. App. 12a. And the court found that the time spent donning and doffing the safety equipment that was not formally required was non-compensable. *Id.* 8a.

In a concurring opinion, Chief Judge Boudin acknowledged that the court's holding conflicted with that of the Ninth Circuit in *Alvarez*, and that "[n]either outcome is impossible analytically and neither is clearly dictated by Supreme Court precedent or underlying policy." Pet. App. 17a, 18a-19a. He also acknowledged that the Secretary of Labor's interpretation supporting petitioners was entitled to "some deference," but nonetheless rejected that interpretation. *Id.* 19a. He concluded by expressly inviting this Court's review:

> [T]he question is how far *Steiner* has qualified the statute. Perhaps it is enough for a lower court that the Secretary's position is, in practical effect, a substantial step beyond *Steiner*. As *Steiner* itself tempers the Portal-to-Portal Act's main thrust, probably its extension should be left to the Supreme Court. * * * It may be time for the Supreme Court to have another look at the problem.

Id. 19a.

5. This petition followed.

REASONS FOR GRANTING THE WRIT

I. This Case Presents Important Questions That Have Divided The Circuits And Merit This Court's Review.

This petition presents important, interrelated questions concerning the compensation of hourly wage workers for substantial periods of time spent performing tasks either expressly required of them by their employers or necessary to the safe performance of their jobs: walking to and waiting at safety equipment distribution stations, and donning and doffing the equipment distributed there. This Court held in

Steiner that time spent donning and doffing such equipment is "compensable" under the FLSA, but several crucial related questions remain unresolved and have divided the lower courts. This Court's intervention is thus warranted.

1. The first question is whether *walking* time associated with the donning and doffing of required safety equipment – including time spent walking to equipment distribution stations, from those stations to the changing room, and from the changing room to the work floor at the start of a shift, and the reverse of each of these steps at the end of the shift – is "compensable work time," *Steiner*, 350 U.S. at 249, under the FLSA. The court of appeals in this case held that this walking time was not compensable under the Portal-to-Portal Act, which amended the FLSA, because it was merely "preliminary or postliminary," 29 U.S.C. 254(a)(2), to the principal activity that the workers are hired to perform. Pet. App. 8a-10a. This holding squarely conflicts with that of the Ninth Circuit in *Alvarez*. See *Alvarez*, 339 F.3d at 906-07.

2. The second question is whether *waiting* time – *viz.*, the time employees spend waiting at the equipment distribution stations for the items they must wear – is compensable. This Court addressed the compensability of waiting time in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 136-37 (1944), holding that "no principle of law found either in the statute or in Court decisions precludes waiting time from also being working time," and that whether a particular waiting period is compensable depends on whether the employee is "engaged to wait" (*i.e.*, not free to engage in his own pursuits, but required to wait by the employer) or "wait[ing] to be engaged." *Id.* The First Circuit in this case held, however, that the Portal-to-Portal Act had obviated this distinction:

> Even if we were to find that the employees were engaged to wait under the FLSA and its accompanying regulations, the waiting time would qualify as preliminary or postliminary activity under the Portal-to-Portal Act. "Wait time is compensable when it is part of a principal

> activity, but not if it is preliminary or postliminary activity."

Pet. App. 11a (quoting *Vega* v. *Gasper*, 36 F.3d 417, 425 (CA5 1994)). Citing Labor Department regulations, but inexplicably ignoring the Department's own interpretation of those regulations, the court proceeded to deem the "time spent waiting in line for gear" to be "preliminary" and therefore not compensable under the Portal-to-Portal Act. *Ibid.*

The court of appeals' holding in this case directly conflicts with the Ninth Circuit's decision in *Alvarez*. See *Alvarez*, 339 F.3d at 904 (holding that "'donning and doffing' and 'waiting and walking' constitute compensable work activities); *id.* at 903 (describing how defendant IBP required employees to "wait for and to retrieve that gear in particular areas at particular times"). In addition, the First Circuit's holding regarding waiting time conflicts with other circuits' holdings that time during which an employees are required to wait and are not free to engage in their own pursuits is compensable. See, *e.g.*, *Mireles* v. *Frio Foods*, 899 F.2d 1407, 1411 (CA5 1990); *Cole* v. *Farm Fresh Poultry*, 824 F.2d 923, 929 & n.6 (CA11 1987); see also *Brock* v. *DeWitt*, 633 F. Supp. 892, 895 (W.D. Mo. 1986).[1]

3. The third, closely related question involves the application of the "*de minimis* rule" established by this Court in

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[1] The Tenth Circuit also weighed in on these issues in *Reich* v. *IBP, Inc.*, 38 F.3d 1123 (CA10 1994), reaching a mixed result. Although finding compensable time spent waiting for the distribution of knives, *id.* at 1125, the court held that "walking and waiting" associated with "donning and doffing" was not compensable on the facts of the case. *Id.* at 1127. The court observed that employees often did not move continuously from the activities associated with donning and doffing to their principal work activities, but instead took extended breaks, and that these "differences in personal routines" meant that "workers should be paid on the basis of a reasonable time to conduct these activities, not to include 'wait and walk time.'" *Ibid.*

Anderson v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). The Court there stated:

> The workweek contemplated by § 7(a) must be computed in light of the realities of the industrial world. When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved. The *de minimis* rule can doubtless be applied to much of the walking time involved in this case, but the precise scope of that application can be determined only after the trier of facts makes more definite findings as to the amount of walking time in issue.

Id. at 692. Thus, although whether a particular activity is "compensable" under the FLSA is a legal question, whether the amount of time spent on compensable activity is *de minimis* is a question for the trier of fact.

In this case, the district court granted summary judgment in favor of the defendant as to the compensability of all activities other than the time spent actually donning and doffing required equipment. A jury then determined that the amounts of time spent on donning and on doffing, when each was taken in isolation, were *de minimis*.

This case thus presents the question whether the court should defer to the Department of Labor's conclusion that an activity that is "compensable work" within the meaning of the FLSA may signal the start or stop of the work day even if it, taken alone, occupies a *de minimis* quantity of time. Petitioners' donning and doffing of required safety equipment undisputedly met the criteria for compensable work; that conclusion follows directly from *Steiner*, as the district court and court of appeals recognized. As the Secretary argued below, walking and waiting time that falls between those com-

pensable acts is part of the "workday" and is therefore not subject to the limitations of the Portal-to-Portal Act. This conclusion, the Secretary emphasized, is not altered by the jury's finding that the donning and doffing periods were themselves *de minimis*, because the *de minimis* rule, which exists purely to avoid the administrative inconvenience of clocking tiny, separate increments of time, has nothing to do with the determination of whether an activity is compensable as a matter of law and thus marks the beginning or end of a workday.

In resolving this question, this Court should also provide guidance to the courts of appeals as to how the period of time that is the subject of the *de minimis* inquiry should be defined, a subject that has divided the lower courts. The Secretary of Labor observed below that most courts have applied the *de minimis* standard to the *aggregate* amount of compensable work time for which employees have not yet been compensated, with the aggregation done over a period of *at least* one work day; indeed, some courts have aggregated the entire amount of time at issue in a given *claim*. See, *e.g.*, *Lindow* v. *United States*, 738 F.2d 1057, 1063 (CA9 1984) (aggregating at least on a daily basis, and applying a three-factor test, considering the amount of time spent daily, the amount of total time involved in each employee's claim, and the administrative burden imposed by requiring compensation); *Brock* v. *City of Cincinnati*, 236 F.3d 793, 804 (CA6 2001) (same, following *Lindow*); *Kosakow* v. *New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 719 (CA2 2001) (same, following *Lindow*); *Reich* v. *Monfort, Inc.*, 144 F.3d 1329, 1333-34 (CA10 1998) (same, following *Lindow*); *Nardone* v. *Gen. Motors, Inc.*, 207 F. Supp. 336, 340 (D.N.J. 1962) (aggregating in terms of "minutes per day"). In *Alvarez*, oddly, the Ninth Circuit did not apply the *Lindow* test but instead deemed a single category of activity – the donning and doffing of "non-unique" equipment such as hard hats – to be "*de minimis* as a matter of law." 339 F.3d at 903. This approach plainly conflicted with that of numerous other circuits.

This issue is presented by this case for two reasons. First, it is inextricably bound up with the question whether the *de minimis* inquiry is part of the definition of the "workday." As the Secretary argued, it would be impossible to aggregate the amount of time spent per workday if the "workday" itself were not first defined; assuming the majority approach is correct, the *de minimis* inquiry cannot itself be an aspect of defining the workday, or else the definition would be hopelessly circular. See *infra* Part III.A. Second, the aggregation issue will be presented on remand, making this Court's guidance essential. In this case, the jury's *de minimis* determination was based solely on the amount of time spent actually donning the required equipment and, separately, the time spent doffing it. If this Court holds that the associated walking and/or waiting time is also compensable, the question will then be presented whether the new *de minimis* calculation must be based on the aggregate amount of time spent on waiting, walking, donning, and doffing time, or on each activity separately. Thus, this case presents the opportunity for this Court to resolve the important circuit split regarding the application of the *de minimis* rule.

4. The final question presented here is whether the court of appeals erred in holding that the donning and doffing of safety gear not formally required by the employer or by law, but required by the necessities of the job, was *not* compensable. That gear includes cold-weather jackets and glove liners that enable employees to withstand the extreme cold to which they are exposed, as well as aprons and sleeve covers used for sanitation and back belts used to protect the employees from injuries. As discussed further in the next Part, the court of appeals' holding that this donning and doffing was non-compensable – which turned solely on the lack of a formal job or regulatory requirement – flatly contradicts *Steiner*, in which the donning and doffing of similarly non-required equipment was held compensable. And it even more plainly conflicts with the Sixth Circuit's decision in *Steiner*, which this Court affirmed, and which expressly considered and re-

jected the very required/non-required distinction the court of appeals relied on here. See *Steiner* v. *Mitchell*, 215 F.2d 171, 174-75 (CA6 1954).

Certiorari is warranted not only because of the circuit conflicts these issues present, but also because these questions directly and substantially affect the compensation of hundreds of thousands, and perhaps millions, of hourly wage workers in high-risk industrial jobs who are required to wear safety gear or other special equipment when they work. For example, the meat industry alone employs over 350,000 workers in production positions, most as slaughterers, meat packers, or meat cutters. See Bureau of Labor Statistics, 2001 National Industry-Specific Occupational Employment and Wage Estimates, SIC 201 – Meat Products, *available at* http://www.bls.gov/oes/2001/oesi3_201.htm. And the amount of time involved is substantial enough to make a serious difference to these low-wage workers' pay. When donning and doffing are taken together with the associated walking and waiting, petitioners here alleged that they spent, depending on their job category, between twenty and thirty-seven minutes on these activities per day.

The courts of appeals' conflicting interpretations of the FLSA, the Portal-to-Portal Act, and the associated Department of Labor regulations thus leave innumerable low-wage employees in a state of considerable uncertainty as to the compensation to which they are entitled; they also place companies in the untenable position of facing different federal compensation requirements in different parts of the country. This Court has on numerous occasions determined that very similar issues merit its resolution. See *Barrantine* v. *Ark. Best Freight Sys.*, 450 U.S. 728 (1981); *Mitchell* v. *King Packing Co.*, 350 U.S. 260, 263 (1956); *Steiner*, 350 U.S. at 256; *Anderson*, 328 U.S. at 692; *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944); *Skidmore* v. *Swift*, 323 U.S. 134, 136-37 (1944). It should do so again here.

II. This Case And *IBP* v. *Alvarez* Present Overlapping But Distinct Issues, And Both Merit This Court's Review.

Rather than merely granting certiorari in *Alvarez*, the Court should also grant this petition and consolidate the two cases. Both present the first question raised by the *Alvarez* petition – whether walking time is compensable – and *Alvarez* is properly regarded as the vehicle to decide that issue. For the reasons described in the *Alvarez* petition, that question merits review in this Court. The conflict frequently recurs in the courts; involves sums that are financially significant for employees and, in the aggregate, for employers; and results in disparate pay policies for employees at different plants within the same company. See *Alvarez* Pet. at 11-14 (describing circuit conflict); *id.* at 15-17 (explaining its importance).

Of note, however, granting certiorari only in *Alvarez* would raise the distinct prospect that the important walking time issue would be left unresolved. A ruling in favor of the employer in *Alvarez* on the second question presented by that petition – whether time related to changing safety equipment may be rendered non-compensable pursuant to a collective bargaining agreement under FLSA Section 3(o) – would dispose of that case. Granting certiorari in both cases will ensure that this Court is able to resolve the walking time question

Certiorari is also warranted in this case because this petition presents further questions relating to the compensability of equipment-changing time on which the lower courts require guidance. The *Alvarez* petitioner, for example, does not seek this Court's review of the important split between the First and Ninth Circuits over whether time spent *waiting* for equipment is compensable. Nor does *Alvarez* present the important issue whether time spent donning and doffing non-required equipment by the employer is compensable.

A ruling in this case (unlike *Alvarez*) would also resolve the uncertainty that surrounds the FLSA's application to work environments where the time necessary to don and doff safety

equipment is *de minimis*, but the associated waiting and walking time is significant. That too is a frequently recurring scenario in beef and poultry operations, as some equipment may be put on or taken off with relative ease and speed but (as in this case) may be dispersed among several different stations in the plant. In addition, each station may have significant waiting lines because of the bottleneck created as each employee passes through. This case illustrates that the actual donning and doffing time held compensable in *Steiner* is often comparatively minimal – but *only if* the time spent walking to and waiting at distribution stations is excluded.

A decision by this Court in the *Alvarez* case alone addressing merely the compensability of walking time would leave unresolved the proper disposition of this important class of cases and would additionally leave unsettled the proper period of time over which courts should aggregate in order to perform the *de minimis* inquiry – an issue that has divided the circuits and that, although decided by the Ninth Circuit in *Alvarez*, is not presented to this Court in that case because the respondents there did not cross-petition. By contrast, this case is an excellent vehicle for this Court to review the Secretary's interpretation, because the jury's *de minimis* finding makes its application outcome-determinative as to the compensability of the walking and waiting time that occurred after the donning and before the doffing of required safety equipment.

Finally, we note that the procedural posture of *Alvarez* is unusual in that the respondent-plaintiffs will receive the same monetary judgment no matter whether they prevail in this Court. See *Alvarez* BIO at 9-11. Although we do not believe that this fact renders the questions presented moot, some members of the Court may disagree or may conclude that the case's posture will affect the course of that case's litigation here. Granting certiorari in both *Alvarez* and this case would obviate those concerns.

III. The Court Of Appeals Erred In Deeming The Walking And Waiting Time In This Case Non-Compensable.

For three reasons, the court of appeals erred in holding that the walking and waiting time associated with donning and doffing safety equipment was not compensable. First, the time between the first and last compensable activities of the day (whether or not those activities occupy more than a *de minimis* period) is part of the "workday" and thus not subject to the limitations of the Portal-to-Portal Act. Second, walking and waiting time is in any event compensable because it, like the time spent donning and doffing required equipment, is integral and indispensable to the employees' principal job activities. Third, as to both contentions, the court should have deferred to the views of the Secretary of Labor persuasively interpreting the FLSA and Portal-to-Portal Act and authoritatively interpreting her agency's own regulations.

A. The "Workday" Runs Continuously Between The First And Last Compensable Activities Of The Day, Such That All Activities In Between Are Compensable.

As the Secretary of Labor explained in her *amicus* brief below, the "bedrock principle" underlying the definition of compensable time under the FLSA, as amended by the Portal-to-Portal Act, is that employees will be paid for all activities that take place during the "workday." See Sec. of Labor *Amicus* Brief Supporting Pet. for Reh'g at 6 (hereinafter Labor Br. I) (citing 29 U.S.C. 254(a)). With the exception of bona fide meal periods and break periods that are "long enough to enable [the employee] to use the time effectively for his own purposes," 29 C.F.R. 785.16(a), the "workday" is a continuous period; it does not start and stop repeatedly as the employee moves from one activity to the next. The Portal-to-Portal Act thus defines as non-compensable only those hours "prior to the time on any particular workday at which such employee commences, or subsequent to the time on any

particular workday at which he ceases, such principal activity or activities." 29 U.S.C. 254(a).

As the Secretary explained, the "plain language of the Portal Act and the import of the Secretary's interpretive regulations when read in their entirety require that the first and last principal activities performed by an employee mark the beginning and end of his 'workday,' and all time spent between the performance of those activities, including walking and waiting time, is compensable." Labor Br. I, *supra*, at 5-6. There is no dispute that petitioners' donning and doffing of required safety equipment is such a "principal activity," because it is "integral and indispensable" to the employees' work: that was the holding of *Steiner*, 350 U.S. at 252-53, which the court of appeals correctly followed here, Pet. App. 7a. Thus, at a minimum, petitioners' workday runs continuously from the time they don the first piece of required equipment until the time they doff the last such item, except for bona fide lunch periods and other substantial breaks. It thus encompasses any walking and waiting time that occurs during that period, and the First Circuit's contrary ruling is erroneous.[2]

This "continuous workday" rule is supported by, in addition to the statute's plain language, its legislative history and the case law interpreting it. According to the Senate Report on the Portal-to-Portal Act, "Any activity occurring during a workday will continue to be compensable in accordance with the existing provisions" of the FLSA; the Portal-to-Portal Act "relieves an employer from liability" only for payment for activities that "take place outside of the hours of the employee's workday." S. REP. NO. 80-48, at 48, 46-47 (1947). See also 29 C.F.R. 790.6.

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[2] Indeed, the workday actually starts earlier, beginning when the employees commence waiting in line at the first equipment distribution station; as discussed in the following section, such waiting time is itself compensable as a "principal activity."

With the exception of the court of appeals in this case, the lower courts have faithfully applied the "workday" concept. See, *e.g.*, *Alvarez*, 339 F.3d at 907 ("There is nothing in the statute or regulations that would lead to the conclusion that a workday may be commenced, then stopped while the employee is walking to his station, then recommenced when the walking is done."); *United Transp. Union Local 1745* v. *City of Albuquerque*, 178 F.3d 1109, 1119 (CA10 1999); *Mireles*, 899 F.2d at 1414; *Crenshaw* v. *Quarles Drilling Corp.*, 798 F.2d 1345, 1351 (CA10 1986); *Dooley* v. *Liberty Mut. Ins. Co.*, 307 F. Supp. 2d 234, 243 (D. Mass. 2004); *Reich* v. *IBP, Inc.*, 820 F. Supp. 1315, 1325 (D. Kan. 1993), aff'd, 38 F.3d 1123 (CA10 1994); *Dole* v. *Enduro Plumbing, Inc.*, 30 Wage & Hour Cas. (BNA) 196, 200 (C.D. Cal. Oct. 16, 1990).

The continuous workday rule is also supported by the Department of Labor's regulations. The principal regulation setting forth the workday principle is 29 C.F.R. 790.6(a), which states in relevant part:

> Section 4 of the Portal Act does not affect the computation of hours worked within the "workday" proper, roughly described as the period "from whistle to whistle," and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by an employee during that period. Under the provisions of section 4, one of the conditions that must be present before "preliminary" or "postliminary" activities are excluded from hours worked is that they "occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases" the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular

> workday, the provisions of that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted.

Id. (citing legislative history). See also *id.* § 790.6(b); *id.* § 785.9;.*id.* 785.38.[3]

The application of the continuous workday rule is not affected by the determination that the activities that mark the beginning and end of the workday are, taken alone, *de minimis* in length. As the Secretary has explained, "the concept of de minimis is not relevant in determining the beginning and end of the 'workday.'" Secretary of Labor Supp. Br. in Supp't of Reh'g at 2 (hereinafter Labor Br. II). The *de minimis* rule has an altogether different provenance from the statutory definition of compensable working time; this Court created the rule in the *Mt. Clemens* case, 328 U.S. at 692, as essentially a prudential limitation on the FLSA's compensation requirements; the "realities of the industrial world" make it impractical for employers to keep track of "[s]plit-second absurdities." *Ibid.*

In other words, in order to determine whether employees must be paid for certain pre- and post-shift activities, courts (and juries) must engage in a two-step inquiry. First, is the activity in question compensable "work" under the FLSA and Portal-to-Portal Act? Second, if so, is the period of time the activity occupies more than *de minimis*?

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[3] Under the law in place prior to the Portal-to-Portal Act's passage, all of the walking and waiting time at issue in this case would indisputably be compensable work. See *Mt. Clemens*, 328 U.S. at 690-91 (holding that employees were entitled to compensation for the time spent walking from plant entrance to their work stations).

As discussed above, the courts have generally approached the *de minimis* determination by aggregating the amount of time spent on compensable but uncompensated activities each day, or even aggregating the total amount involved in the claim, then determining whether these activities, taken together, are *de minimis*. See, *e.g.*, *Lindow*, 738 F.2d at 1063. As the Secretary explained below, this approach cannot be reconciled with the view that the "workday" must itself be defined to exclude activities deemed "*de minimis*":

> [A]ggregation of uncompensated time, for purposes of a de minimis determination, can only take place after the "workday" is established. Discrete activities such as, for example, the donning of goggles, cannot be looked at in isolation and declared to be in and of themselves de minimis or not, and on that basis be determinative of whether the "workday" begins. Rather, there must be a determination of the "workday" based on the employee's first and last principal activities (or those activities that are integral to the performance of the employee's principal activities). Only then, after the "workday" is fixed, can a determination be made whether all the otherwise compensable time within the workday, for which employees were not compensated, should be compensated * * *.

Labor Br. II, *supra*, at 5-6.

B. All Of The Time At Issue In This Case Is Compensable Under The Portal-To-Portal Act Because It Is Integral And Indispensable To Petitioners' Principal Job Activity.

1. As noted in the previous section, the only possible basis for excluding any of the time in question from the definition of compensable work is the limitation found in the Portal-to-Portal Act, which was passed in response to this Court's holding in *Mt. Clemens*, 328 U.S. 680, that employees were entitled to compensation for travel from a plant's entrance to their individual work stations. The Act provides that no employer shall be required by FLSA to pay for

> (1) walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. 254(a). The import of the Portal-to-Portal Act for this case is that it deems non-compensable petitioners' initial walking time from the plant entrance to the place at which they commence the process of acquiring and donning safety equipment – that is, depending on the order in which the employees proceed, the time spent walking to the first equipment distribution station or to their lockers – as well as the return trip out to the plant entrance from the lockers or disposal bins at the end of the day. The Act does *not* deem non-compensable the time spent waiting at the distribution stations, nor the time spent walking between the stations, the lockers, and the production floor.

The central issue in the application of the Portal-to-Portal Act is whether the activities in question are merely "preliminary to or postliminary to" employees' principal job duties, or whether they are, alternatively, part of those duties (or, as discussed above, part of the workday). This Court established the line between these two categories in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), holding that "activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by Section 4(a)(1)." *Id.* at 256. The Court held that, under this standard, the donning and doffing of gear that was necessary for employee safety, as well as time spent shower-

ing as required by the employer, was "clearly an integral and indispensable part of the principal activity." *Ibid.*

2. Applying the *Steiner* standard, the court of appeals in this case affirmed the district court's holding that the time petitioners spent donning and doffing required safety equipment was part of the principal activity. In light of that holding, the conclusion that the contested walking and waiting time was also compensable should have been clear. Petitioners obviously could not put on equipment that they did not possess. Because respondent required them to obtain new or laundered gear each day from the distribution stations, the *only way* petitioners could engage in the principal work activity of donning and doffing gear was to walk to and wait at those stations. Acquiring the gear, a process consisting of walking and waiting, was straightforwardly "integral and indispensable" to the process of putting it on. Similarly, petitioners were required, upon doffing the equipment, to drop it in laundry bins so that it could, for essential reasons of safety and hygiene, be cleaned for the next day. Walking associated with doffing equipment is thus also compensable.

The Ninth Circuit in *Alvarez* properly recognized as much. Applying the standard generally applied by the courts of appeals, that to be "'integral and indispensable,' an activity must be necessary to the principal work performed and done for the benefit of the employer," 339 F.3d at 902-03, the court treated the walking and waiting time (the "retrieving" of equipment) as part of the same activity as the donning and doffing itself. *Alvarez*, 339 F.3d at 903 (emphases added and citations deleted) (citing regulations discussed below).

The First Circuit's contrary holding in this case that "[o]n their face," the provisions of the Portal-to-Portal Act "would appear to exempt from compensation the walking at issue here" is baffling. The Act refers only to walking to the place at which the primary activity is performed, and the First Circuit itself held that donning and doffing is part of the primary activity. See Pet. App. 7a. The walking time at issue in this

case is plainly *not* excluded by § 254(a)(1), and the question whether it is encompassed by the somewhat broader exclusion of § 254(a)(2), applying to preliminary and postliminary activity, can be resolved only by reference to the *Steiner* "integral and indispensable" test, a test that the court of appeals never even applied to walking time.

3. In holding that waiting and walking time were not compensable, the court of appeals in this case inexplicably relied on two Department of Labor regulations, even though the Secretary of Labor has authoritatively interpreted those regulations and others to support just the opposite conclusion. First, quoting footnote 49 of 29 C.F.R. 790.7(g), the court noted that "just because the changing of clothes may in 'certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity[,]" this does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) [Portal-to-Portal Act] refers.'" Pet. App. 8a-9a. Similarly, the court also cited 29 C.F.R. 790.8(c) with respect to the waiting time issue, stating that

> while the Code [of Federal Regulations] does not explicitly address the type of waiting time at issue, the Code indicates that a reasonable amount of waiting time is intended to be preliminary or postliminary. By making compensable some activities that are not traditionally thought of as primary activities, such as a logger carrying heavy equipment out to the logging site and a butcher sharpening knives, the Code was compensating workers for activities that are so integral to a principal activity that they cannot be separated from that activity. However, by excluding walking with ordinary equipment and carrying light equipment, the Code indicates that a line must be drawn, otherwise an almost endless number of

> activities that precipitate the employees' essential tasks would be compensable.

Pet. App. 12a.

In her briefs below, the Secretary squarely rejected the court's extrapolations from both of these provisions. She noted that these regulations merely identify particular activities that "*normally* or *ordinarily* would not be considered principal activities," but explained that the regulations would not exclude the activities under the recurring factual circumstances typified by this case. First, the Secretary noted that the provisions in no way conflicted with the agency's interpretation of the "workday" concept; they simply spoke to which activities could be designated the first and last "primary" activities of the day, and did not preclude compensation for anything that came in between. Labor Br. I., *supra*, at 10 ("By culling from the Secretary's interpretive regulations isolated language, the panel failed to recognize the overriding dictate of the regulations – that the reach of the Portal Act is limited by the 'workday' principle."). Second, the Secretary noted that the "ordinary equipment" mentioned as an example in § 790.8(c) was, unlike the equipment at issue here, located at employees' homes; petitioners have never contended that putting on clothing or equipment at home is compensable. Labor Br. I, *supra*, at 12 n.7. Third, the Secretary emphasized that 29 C.F.R. 790(8)(a) provides that the phrase "principal activities" is to be "construed liberally," to encompass, for example, clothes-changing necessary to the job, as well as "any work of consequence performed for the employer." Labor Br. I, *supra*, at 12-13 n.8.

4. Finally, the court of appeals erred in holding that the time spent donning and doffing clothing and safety equipment that was not formally required by respondent was non-compensable. The court of appeals offered little analysis of this question, again making no effort to apply the *Steiner* "integral and indispensable" standard. It simply stated, "Not everything an employee does in her workplace is com-

pensable under the FLSA. These optional items are required neither by the employer nor by the regulations and are worn by Employees at their own discretion." Pet. App. 8a. This holding is irreconcilable with *Steiner* itself, which held that the time spent donning and doffing *non-required* safety equipment was compensable.

The Sixth Circuit in *Steiner* thus considered and squarely rejected the exact argument that the First Circuit in this case embraced:

> Although it has been stipulated that the defendants have never issued any order nor made any formal requirement that their plant employees use the clothes-changing and showering facilities provided by the defendants, the defendants' insurance carrier would not accept the insurance risk if defendants refused to provide showering and clothes-changing facilities for their employees. Such facilities, having been furnished, were intended to be used. From time to time defendants' plant superintendent * * * instructed the employees to change clothes and shower * * * . The furnishing, by defendants, of clothes-changing and showering facilities, and the use of such facilities by defendants' employees, have the effect of reducing and controlling the defendants' potential legal liabilities, enable the defendants to comply with the direct requirements of state law and the indirect requirements of their insurer, and contribute to the continued and uninterrupted operation of the defendants' business by promoting the health of defendants' employees.

215 F.2d at 174-75 (quoting and affirming district court findings). This Court in turn affirmed. *Steiner* thus stands for the proposition that time spent donning and doffing safety equipment is compensable if it is integral and indispensable to the employees' jobs, a determination that does not turn on whether it is a formal job requirement.

C. The Court Of Appeals Erred In Refusing To Defer To The Secretary Of Labor's Interpretive Regulations And Her Interpretations Of Those Regulations.

The court of appeals essentially ignored the well-reasoned, thoroughly explained views of the Secretary of Labor, most of which are embodied in interpretive regulations that have been in place for six decades.

1. This Court held in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944), that the views of the Administrator then responsible for the FLSA were entitled to deference regarding what portions of employee waiting time were to be considered compensable work. The Court held that the Administrator's views, embodied only in an *amicus* brief, informal rulings, and an interpretive bulletin, constituted

> a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Ibid. In this case, the views of the Secretary of Labor regarding the interpretation of the exact same law with regard to a virtually identical issue plainly are entitled to *at least* the same level of deference that the Court held was due in *Skidmore*.

For several reasons, the application of the *Skidmore* standard should produce an even greater degree of deference to the Secretary's views today, even assuming that the form in which they are today embodied – interpretive regulations – do not trigger the greater deference provided under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). See generally *United States* v. *Mead Corp.*, 533 U.S. 218 (2001). First, the core regulations at issue here, setting forth the continuous workday principle, have been in place since 1947, not long after the Portal-to-Portal

Act was passed. See 29 C.F.R. 790.6. This Court has repeatedly recognized that a level of deference at the highest end of the *Skidmore* scale is due to agency interpretations of long standing, see, *e.g.*, *Alaska Dep't of Envtl. Conservation* v. *EPA*, 124 S. Ct. 983, 1001 (2004) (deferring to an EPA view expressed in several publications beginning in 1983), and Section 790.6 is perhaps one of the longest-standing interpretive regulations issued by any agency. Second, the interpretation is contemporaneous with the statute's passage. See, *e.g.*, *Aluminum Co. of Am.* v. *Cent. Lincoln Peoples' Utility Dist.*, 467 U.S. 380, 390 (1984). Third, the regulations are exceptionally detailed and thorough in their analysis, and were based on the Administrator's careful expert analysis. See 29 C.F.R. 790.1 n.5 ("The interpretations expressed herein are based on studies of the intent, purpose, and interrelationship of the Fair Labor Standards Act and the Portal Act as evidenced by their language and legislative history, as well as on decisions of the courts establishing legal principles believed to be applicable in interpreting the two Acts.

Moreover, these regulations are more formal in form than the bulletins and *amicus* briefs at issue in *Skidmore* itself, and may in fact be entitled to *Chevron* deference. This Court has in several instances given *Chevron* deference to interpretive regulations, including in *Chevron* itself. See *Chevron*, 467 U.S. at 844; *Holly Farms Corp.* v. *NLRB*, 517 U.S. 392, 398-99, 405-08 (1996) (deferring to the Labor Department's interpretive regulations construing the FLSA). Indeed, the Court has also given *Chevron* deference to a number of considerably less formal agency pronouncements. See *Christensen* v. *Harris County*, 529 U.S. 576, 589-90 (2000) (Scalia, J., concurring in part and concurring in the judgment) (collecting cases).

2. An additional reason that the Secretary's interpretation of the Portal-to-Portal Act is entitled to a high degree of deference – which was argued below, but ignored by the court of appeals, see Labor Br. I, *supra*, at 7 n.5 – is that the regulations it promulgated in 1947 at 29 C.F.R. Part 790 (including

the principal regulation at issue here, § 790.6) were ratified by Congress when it amended the FLSA in 1949. This Court so held in *Steiner*, explaining that Congress was well informed of and endorsed the agency's interpretation:

> In 1949, Section 3(o) was added to the Act. * * * The congressional understanding of the scope of Section 4 is further marked by the fact that the Congress also enacted Section 16(c) at the same time, after hearing from the Administrator his outstanding interpretation of the coverage of certain preparatory activities closely related to the principal activity and indispensable to its performance.

350 U.S. at 254-55. Section 16(c), in turn, stated:

> Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act.

Id. at 255 n.8 (citing 63 Stat. 920). Because the 1949 amendments were in no way inconsistent with the regulations at issue in this case, this provision should – as *Steiner* suggests – be understood as express congressional ratification of the Administrator's (now Secretary's) interpretation.

Even without such an express congressional acknowledgment, this Court has repeatedly held that when Congress amends a statute but does nothing to change the prevailing agency interpretation, it is understood to have acquiesced. See, *e.g.*, *Boeing Co.* v. *United States*, 537 U.S. 437, 457

(2003); *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 118 (2002); *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). In this case, Congress's *six-decade* acceptance of the agency's "continuous workday" rule is extremely strong evidence that the rule reflects exactly what Congress intended.

3. Most egregious of all, the court of appeals utterly ignored the views of the Department of Labor even when interpreting the Department's *own regulations*. As discussed above, the court interpreted 29 C.F.R. 790.7(g) and 790.8 to support its holding in the face of the Secretary's extensive explanation in its *amicus* briefs that those provisions do not support the result the court reached and, in any event, are simply inoperative with respect to activities that occur during the "workday" as defined by the operative regulation, § 790.6. The court said nothing about this point.

In addition, the court simply disagreed with the Secretary's reading of the "workday" rule itself, but neither applied *any* standard of deference nor explained how its own construction of the "workday" rule was more consistent with the language of either the regulation or the statute itself. See Pet. App. 9a ("The Secretary urges an expansion of the ordinary 'workday' rule in favor of a broader, automatic rule that any activity that satisfies that integral and indispensable test itself starts the workday, regardless of context."). Contrary to the court's characterization, the Secretary's interpretation (which indeed accounts for "context" – for example, whether the activity takes place at the workplace or at home) is hardly an "expansion" of the "ordinary" workday rule. Instead, it is embodied in the language of § 790.6 itself, as promulgated in 1947. See, *e.g.*, 29 C.F.R. 790.6(b) (explaining that waiting time may mark the commencement of the workday); *id.* § 790.6(a) (workday runs from the "first principal activity" to the "last principal activity"). It should be noted that the proposition the court of appeals imputed to the Secretary is hardly a radical one. Because the "integral and indispensable" test defines what the employee's "principal activities"

include, see *Steiner*, 350 U.S. at 256 (activities are compensable if they "are an integral and indispensable *part of* the principal activities"), it should be obvious that activities satisfying that test do, pursuant to the plain language of the regulation and the statute itself, start the workday.

An agency's interpretation of its own regulations is entitled to great deference. See *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) ("Because the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'" (quoting *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989))). Contrary to the court of appeals' suggestion, Pet. App. 10a, this standard applies even if – as in *Auer* – that interpretation comes in the form of an *amicus* brief. 519 U.S. at 462. The Secretary's interpretation of her agency's regulations clearly satisfies the *Auer* standard: it is completely consistent with, and if anything compelled by, the regulatory language.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari in this case and in No. 03-1238. *IBP, Inc.* v. *Alvarez*, and consolidate the two cases.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 02-1679, 02-1739

Abdela Tum, et al., Plaintiffs, Appellants,

v.

BARBER FOODS, INC., D/B/A BARBER FOODS,
DEFENDANT, APPELLEE.

Heard: Jan. 10, 2003.
Filed: March 10, 2004.

Appeal from the United States District Court for the District of Maine

Before BOUDIN, Chief Judge, TORRUELLA and LYNCH, Circuit Judges.

OPINION

TORRUELLA, Circuit Judge.

Plaintiffs-appellants are a group of hourly wage employees ("Employees") who brought suit against their employer, Barber Foods, for alleged violations of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 216(b). Employees sought compensation for alleged unrecorded and uncompensated work performed by them for Barber Foods.

The district court granted partial summary judgment for the defendant. A trial was held on the issue of whether the time spent donning and doffing required clothing constituted "work" and whether such time was *de minimis*. The jury found for the defendant. Employees appeal from the grant of

summary judgment, and from the district court's decision and they challenge two of the district court's jury instructions. Barber Foods cross-appeals, arguing that the district court erred in ruling that the donning and doffing of required clothing and equipment is an integral part of the Employees' work for Barber Foods and is not excluded from compensation under the Portal-to-Portal Act as preliminary or postliminary activity.

After initial review by the panel, we affirmed. *Tum v. Barber Foods, Inc.*, 331 F.3d 1 (1st Cir. 2003). Plaintiffs filed a petition for rehearing, after which we received an amicus brief from the Secretary of Labor ("the Secretary").[4] Having considered the arguments, we now grant rehearing but affirm.

I. BACKGROUND

Located in Portland, Maine, Barber Foods is a secondary processor of poultry-based products. It purchases boneless chicken breast in bulk and processes that raw material into finished products such as stuffed entrees, chicken fingers, and nuggets. Barber Foods has two shifts, each with six production lines, consisting of three "specialty" lines and three "pack-out" lines. The product is assembled on the specialty lines, and then, after passing through large spiral freezers, the product is pouched, packed, and palletized on the pack-out lines.

The production lines are staffed primarily by rotating associates, employees who generally rotate to different positions on the lines every two hours. In addition to rotating associates, Barber Foods employs set-up operators whose primary duty is to ensure that various machines on the lines are operating properly, meatroom associates who work where the raw product is blended with ingredients, shipping and receiv-

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[4] In addition, the Secretary has filed two letters pursuant to Fed. R. App. P. 28(j).

ing associates, maintenance employees, and sanitation employees.

All associates are expected to be on the production floor ready to work when their shift begins. They are paid from the time they actually punch in to a computerized timekeeping system from time clocks located at the entrances to the production floor.

A. Equipment

Rotating associates are required to wear lab coats, hairnets, earplugs, and safety glasses. The lab coats, hairnets, and earplugs must be on before they can punch in and until they punch out. Safety glasses and any items that they choose but are not required to wear, such as gloves, aprons, and sleeve covers, can be donned after punching in and doffed before punching out.

Before they punch in, set-up operators are required to wear lab coats, hairnets, earplugs, safety glasses, steel-toed boots, bump hats and back belts and are required to carry lock-out/tag-out equipment, which they put in their lab coat pocket. Any other items they choose to wear may be donned after punching in.

Meatroom associates are required to wear lab coats, hairnets, earplugs, safety glasses, steel-toed boots, back belts, aprons, and vinyl gloves. Many also choose to wear sleeve covers. All items must be on before punch in, except the apron, gloves, and sleeve covers, which can be donned after punching in and doffed before punching out.

Shipping and receiving associates are required to wear steel-toed boots, hard hats, and back belts. They generally don these items before punching in and doff them after punching out. Their time clock is located on the production floor, so they must also don and doff lab coats, hairnets, and earplugs in order to enter the production floor to punch in and out.

Employees obtain lab coats and cotton glove liners from the hallway between the entranceway and the equipment

cage. The lab coats are on hanger racks, and the glove liners are in tubs. Hairnets, earplugs, vinyl gloves, sleeve covers, and aprons are dispensed from the window of the equipment cage. Vinyl gloves, sleeve covers, and aprons are also available from tubs on the production floor.

Bump hats, back belts, safety glasses, steel-toed boots, and reusable earplugs are dispensed once and then replaced as needed. Items retained by associates may be stored in their locker or taken home. Lab coats and gloves are laundered and reused; on their way out of the plant, associates drop these items in laundry bins located at several points along the hallway from the production floor exits to the plant exits. Vinyl gloves, sleeve covers, and aprons are disposed of in trash bins located on the production floor and along the hallways from the production floor exits to the plant exits.

Employees may have to wait to obtain and dispense with clothing and equipment. At busier times, there may be lines at the coat racks, glove liner bins, and cage window. There may also be lines at the time clocks.

B. Time Keeping

Barber Foods uses a computerized time-keeping system. The system downloads clock punches into the payroll software. Time clocks are located at the entrances and exits to the production floor and at various other locations in the facility. Each employee has a swipe card with a bar code, which she swipes through the time clock. Rotating associates, set-up operators, and meatroom employees generally punch in at a clock in the area where they will be working and punch out on the clocks located next to the two primary exits. Maintenance employees punch in on a time clock in the maintenance room. Shipping-and-receiving employees punch in and out on the plant office clock located by the shipping-and-receiving office. Sanitation associates punch in on the cafeteria clock and punch out at the plant office clock.

Employees get paid from the moment they punch in. In an attempt to stagger check-in times, Barber Foods allows

Employees twelve minutes of "swing time," meaning that Employees can punch in up to six minutes early and get paid for that additional time or punch in up to six minutes late and not be charged with an attendance violation.

C. History of Dispute

Seven current employees and thirty-seven former employees brought suit in district court claiming that Barber Foods violated the FLSA by forcing its hourly employees to work "off the clock" by not paying Employees for the time it takes to obtain, don, and doff their gear. Although the district court granted summary judgment for the defendants as to most counts, the court denied summary judgment as to the claim involving the donning and doffing of required clothing and equipment. The court found that the donning and doffing of clothing and equipment required by Barber Foods or by government regulation is an integral part of Plaintiffs' employment. This finding removed the donning and doffing of required gear from the Portal-to-Portal Act and its exclusion of compensability for preliminary or postliminary activity. 29 C.F.R. § 790.8. A trial was held on the issue of whether the time spent donning and doffing required clothing was *de minimis* and thus did not constitute work under the FLSA.

The jury found that the combined donning and doffing times are 1 minute for rotating associates, 2 minutes 16 seconds for set-up operators, 1 minute 53 seconds for meatroom associates, 2 minutes 8 seconds for shipping and receiving associates, and no time for maintenance and sanitation workers because they are not required to don clothing before punching in or to doff clothing after punching out. The jury found that each of these donning and doffing times is *de minimis*, making the donning and doffing time non-compensable. Employees do not challenge the jury's findings.

Employees appeal the following findings in the partial summary judgment decision: (1) that the time employees must necessarily spend walking and waiting in connection

with obtaining, donning, doffing, and disposing of the sanitary and protective gear required by Barber Foods and/or federal regulation is not compensable; (2) that the time spent donning and doffing clothing, equipment, and gear which is not expressly required by Barber Foods is non-compensable.[5] In addition, Employees challenge two district court jury instructions.[6]

II. STANDARD OF REVIEW

We review summary judgment decisions de novo. *Kauch v. Dep't for Children, Youth and Their Families*, 321 F.3d 1, 3-4 (1st Cir. 2003). Construing the facts in the light most favorable to the nonmoving party, our role is to "determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

III. DISCUSSION

The FLSA requires an employer to record, credit, and compensate employees for all of the time which the employer requires or permits employees to work, 29 U.S.C. § 201, *et seq.*, commonly defined as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tenn. Coal, Iron &*

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[5] In their brief, Employees argue that the district court erred in finding that Employees failed to raise in their Complaint or in their Opposition to Summary Judgment a claim that they are entitled to compensation for Employees' activities after punching out on the time clocks. Because we find that it is at least arguable that the issue was raised below, we address it on the merits.

[6] In their Statement of Issues, Employees contend that they appeal from the district court's finding that Barber Foods is entitled to summary judgment on the issue of whether time spent by maintenance and shipping and receiving employees is *de minimis*. However, they have waived their right to appeal by failing to make an attempt at developed argumentation. *Twomey v. Delta Airlines Pilots Pension Plan*, 328 F.3d 27, 33 n.4 (1st Cir. 2003).

R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 598, 64 S. Ct. 698, 88 L. Ed. 949 (1944); *see also Reich v. New York City Transit Auth.*, 45 F.3d 646, 649 (2d Cir. 1995).

However, even when an activity is properly classified as "work," the Portal-to-Portal Act, 29 U.S.C. § 254, exempts from compensation activities which are preliminary or postliminary to an employee's principal activity or activities unless they are an "integral and indispensable part of the principal activities for which covered work[ers] are employed and not specifically excluded by section 4(a)(1) [of the Portal-to-Portal Act]." *Lindow v. United States*, 738 F.2d 1057, 1060 (9th Cir. 1984) (citation and quotations marks omitted); *Reich*, 45 F.3d at 649. In addition, some activities that may qualify as "work" and fall outside of the Portal-to-Portal Act nevertheless do not require compensation because the activities require such little time that they are adjudged de minimis. *Dunlop v. City Elec., Inc.*, 527 F.2d 394, 401 (5th Cir. 1976).

A. Donning and Doffing of Gear

The district court found that the donning and doffing of required gear is an integral and indispensable part of Employees' principal activities. *See generally Steiner v. Mitchell*, 350 U.S. 247, 76 S. Ct. 330, 100 L. Ed. 267 (1956) (holding that activities should be considered integral and indispensable when they are part of the principal activities for the particular job tasks); *Mitchell v. King Packing Co.*, 350 U.S. 260, 76 S. Ct. 337, 100 L. Ed. 282 (1956). We agree with the district court's conclusion as to the required gear. In the context of this case, Employees are required by Barber Foods and or government regulation to wear the gear. Therefore, these tasks are integral to the principal activity and therefore compensable. *See Alvarez v. IBP, Inc.*, 339 F.3d 894, 903 (9th Cir. 2003) (holding that donning and doffing which is both required by law and done for the benefit of employer is integral and indispensable part of the workday); *cf.* 29 C.F.R. § 1910.132(a).

As relates to the non-required gear, Employees contend that any activity which promotes safety and sanitary conditions necessarily benefits the employer. We think this takes the argument too far. The donning and doffing of non-required gear is not compensable under these facts. Not everything an employee does in her workplace is compensable under the FLSA. These optional items required are neither by the employer nor by the regulations and are worn by Employees at their own discretion.

B. Walking Time

Employees argue that the district court improperly excluded from compensable time the periods Employees walk from one area where they obtain an initial piece of clothing or equipment (required by Barber Foods and/or USDA regulations) to another area where they obtain additional items, the period they spend walking from getting their garb to the time clocks, and the period they spend walking to the area where they dispose of clothing and equipment after they punch out.

The Portal-to-Portal Act specifically addresses walking time, generally exempting from compensation "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform." 29 U.S.C. § 254(a)(1). The Act also generally exempts from compensation activities which are preliminary or postliminary to an employee's principal activity or activities. *See* 29 U.S.C. § 254(a)(2). On their face, these provisions would appear to exempt from compensation the walking at issue here.

Employees argue that the Portal-to-Portal Act excludes only that walking time which occurs before an employee commences her principal activity or activities. See 29 U.S.C. § 254(a)(1)-(2). The Code of Federal Regulations ("Code") states that Congress intended the term "principal activities" to be broad. 29 C.F.R. § 790.8(a) (2002). However, the Code regulations state that just because the changing of clothes may in "certain situations be so directly related to

the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's 'principal activity[,]' [t]his does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) [Portal-to-Portal Act] refers." 29 C.F.R. § 790.7(g) n.49 (citing colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298) (internal citation omitted).

Compensability issues are determined under the FLSA and its accompanying regulations. Both parties agree that the Portal-to-Portal Act does not apply to questions of compensability during the "workday."[7] The Secretary urges an expansion of the ordinary "workday" rule in favor of a broader, automatic rule that any activity that satisfies the "integral and indispensable" test itself starts the workday, regardless of context. This extension overreaches and would lead to the absurd result that an employee who dons required equipment supplied by the company at 5:00 a.m., at his own home, starts his workday for FLSA purposes at 5:00 a.m. – even though he is not required to punch in to work and does not punch in until 8:00 a.m. This plainly cannot be what Congress intended. The Secretary offers a fallback position that the workday starts with any donning or doffing of required gear so long as it is done on company property. But the logic of the Secretary's position does not permit such a narrowing, nor does the

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[7] The regulations state that "[p]eriods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal[-to-Portal] Act had not been enacted. The principles for determining hours worked within the 'workday' proper will continue to be those established under the Fair Labor Standards Act without reference to the Portal Act . . . ." 29 C.F.R. § 790.6.

Secretary's fallback argument make sense in a world, for example, in which not all employees who perform work that is compensable under the FLSA do so at a facility owned and run by their employer.

Further, nothing in *Steiner* requires the result that the Secretary urges,[8] and the Secretary's rule threatens to undermine Congress's purpose in the Portal-to-Portal Act, which (with rare exceptions) sought to exclude preliminary and postliminary waiting and walking time from compensability. Not surprisingly, the Secretary's broad position has implicitly been rejected by two circuits. *See Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556, 563 n.12 (E.D. Tex. 2001), *aff'd*, 44 Fed. Appx. 652, 2002 WL 1396949 (5th Cir. 2002); *Reich v. IBP, Inc.*, 38 F.3d 1123, 1127 (10th Cir. 1994). *But see Alvarez*, 339 F.3d at 906-07.

The Secretary's position is one taken in litigation, in response to an invitation from this court. The Secretary has no authority to promulgate legislative rules in this area. The Secretary has promulgated interpretive regulations, which are entitled to some weight, *see Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944), but those regulations appear to cut both ways on the facts of this case. In any event, the Secretary's present litigation position, in our view, pushes so far that it threatens to undermine the Portal-to-Portal Act. We affirm the determination that the employees' walking time is not compensable.

C. Waiting Time

Employees claim that Barber Foods must compensate them for all the time they spend waiting in line to receive the

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[8] *Steiner* concerned only time spent in the donning and doffing of special protective equipment and in required protective showers. *Steiner* did not purport to say that all time walking to where that equipment is stored, waiting to retrieve and return it, and then walking to the time clock is compensable.

required clothing or equipment and to punch in at the time clocks.

Whether waiting time is compensable under the FLSA depends on whether an employee is "waiting to be engaged" or "engaged to wait." *See generally Skidmore*, 323 U.S. at 136-37, 65 S. Ct. 161. Idle time may be considered work under the FLSA where it is controlled by the employer and the time spent is dominated by the need to serve the employer's needs. *See Armour & Co. v. Wantock*, 323 U.S. 126, 133-34, 65 S. Ct. 165, 89 L. Ed. 118 (1944). The regulations elaborate on this principle by stating that an employee is engaged to wait, i.e., working, when "the employee is unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer." *See* 29 C.F.R. § 785.15 (citations omitted). The Secretary argues that the waiting time spent by the Employees is integral to their principal activities, and compensable under the FLSA.

First, Employees argue that they should be compensated for time spent waiting to punch in at the time clocks. Waiting in line to punch in at the time clock is explicitly excluded from compensable activity by 29 C.F.R. § 790.8(c).[9] There is no indication that any of the time spent waiting is controlled by the employer. Employees have adduced no evidence to counter that conclusion.

Second, we turn to the waiting time associated with donning and doffing of clothes. Even if we were to find that the employees were engaged to wait under the FLSA and its accompanying regulations, the waiting time would qualify as preliminary or postliminary activity under the Portal-to-Portal Act. "Wait time is compensable when it is part of a principal activity, but not if it is preliminary or postliminary activity." *Vega v. Gasper*, 36 F.3d 417, 425 (5th Cir. 1994). When we

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[9] "[A]ctivities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities." 29 C.F.R. § 790.8.

look at 29 C.F.R. § 790.8, we find that while the Code does not explicitly address the type of waiting time at issue, the Code indicates that a reasonable amount of waiting time is intended to be preliminary or postliminary. By making compensable some activities that are not traditionally thought of as primary activities, such as a logger carrying heavy equipment out to the logging site and a butcher sharpening knives, the Code was compensating workers for activities that are so integral to a principal activity that they cannot be separated from that activity. However, by excluding walking with ordinary equipment and carrying light equipment, the Code indicates that a line must be drawn, otherwise an almost endless number of activities that precipitate the employees' essential tasks would be compensable. We find that a short amount of time spent waiting in line for gear is the type of activity that the Portal-to-Portal Act excludes from compensation as preliminary.

D. Barber Foods' Cross-Appeal

Although Barber Foods ultimately prevailed on all counts, it appeals the district court's finding that the donning and doffing of Employees' required clothing and equipment is an integral part of the Employees' work at Barber Foods. "As a general rule, a party may not appeal from a favorable judgment simply to obtain review of findings it deems erroneous." *Mathias v. Worldcom Techs., Inc.*, 535 U.S. 682, 684, 122 S. Ct. 1780, 152 L. Ed. 2d 911 (2002) (per curiam).

If we were to do as Barber Foods asks and reverse the challenged district court finding, our action would provide no tangible relief to Barber Foods; the company has already received all requested relief. *See New York Tel. Co. v. Maltbie*, 291 U.S. 645, 54 S. Ct. 443, 78 L. Ed. 1041 (1934).

E. Jury Instructions

Employees challenge two jury instructions, which "[w]e examine . . . to determine whether they adequately explained the law or whether they tended to confuse or mislead

the jury on the controlling issues." *Federico v. Order of Saint Benedict*, 64 F.3d 1, 4 (1st Cir. 1995). We will reverse jury instructions only if the error was prejudicial in light of the entire record. *Id.* at 3. "An erroneous jury instruction necessitates a new trial only if the error could have affected the result of the jury's deliberations." *Allen v. Chance Mfg. Co.*, 873 F.2d 465, 469 (1st Cir. 1989).

The first challenged jury instruction states the following:

> I instruct you that any time spent walking between the time clock and a bin or locker is not compensable . . . It is only the time spent actually putting on or taking off the item and placing it in a bin or locker which you must determine.

After the trial judge gave the instruction, Employees' counsel objected, arguing that the jurors might believe that they are not to compensate an employee if she is walking while donning or doffing.

We find no error in this instruction. When we look at the instructions in their entirety, we find that the jurors were clearly apprised of their duty, and that the instruction would not have confused or misled the jury about the controlling issues.[10]

The second challenge is also without foundation. The challenged instruction states:

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[10] The instruction went on to clarify the jury's duty:

> In deciding how much time it takes an associate to don and doff required clothing and equipment, you are not to decide the actual time it may take any individual employee or associate to perform those activities, rather you must decide the amount of time that you think is reasonably required by a reasonably diligent associate or employee to don and doff the required clothing and equipment.

> Now, I instructed you to don an item of clothing, for legal purposes, means to obtain and put that item on. To doff an item of clothing or equipment for these purposes means to take it off and place it in a bin or locker.

Employees contend that the judge incorrectly defined donning only in terms of clothing and should have included equipment and that the jury could mistakenly conclude that taking an item out of a bin or locker is not compensable.

The trial judge's instruction contained no error. The instruction adequately illuminated the applicable law by stating that donning includes obtaining the item. Consequently, we find that the instruction did not confuse or mislead the jury.

IV. CONCLUSION

For the reasons stated above, we affirm the district court judgment.

Affirmed.

BOUDIN, Chief Judge (concurring).

The central issue in this case is whether walking and waiting time, incident to the donning and doffing of required clothes and equipment, are compensable where (according to findings in the district court) the time spent in donning and doffing is minimal but the combined walking and waiting time may be extensive. There may be no "right" answer short of the Supreme Court's reading of its own precedents, but the problem can at least be understood if the history and underlying tensions are candidly arrayed.

The original Fair Labor Standards Act made compensable time spent in "work," but it defined the concept only in the most general terms without providing the Secretary of Labor with power to make legislative-type rules defining what constituted "work." This left many problems to be

solved piecemeal by litigation. One had to do with traveling within the job site before the main activity commenced; another, with the donning of special gear. A classic example is the miner's travel and descent from the mine portal to the working face.

Against the background of the New Deal (and the war), it was not hard for the Supreme Court to conclude that subterranean travel through dark and dangerous tunnels, undertaken for the mine owner's benefit, was work.[11] Shortly thereafter, the Supreme Court extended the reasoning in the mine-worker cases to conclude that time spent by employees of a medium-sized pottery factory in walking from time clock to work bench, and in making preliminary preparations such as donning and doffing specialized clothing, was work just as much as the actual productive activity that followed. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 691-93, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946).

These holdings contradicted actual pay practice within the industries and created large overhanging liabilities for employers. To the extent that workers received more than the minimum wage, the decisions also upset underlying bargains. A flood of lawsuits followed. Congress responded with the Portal-to-Portal Act to cut off these claims for the past and to provide in the future (with exceptions not here relevant) that compensation was not required for:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
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> (2) activities which are preliminary to or postliminary to said principal activity or activi-

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[11] *See Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161, 163-66, 65 S. Ct. 1063, 89 L. Ed. 1534 (1945); *Tennessee Coal, Iron. & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598-99, 64 S. Ct. 698, 88 L. Ed. 949 (1944).

> ties, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities . . . .

29 U.S.C. § 254(a) (2000).

A decade later, this new legislative balance was reset (and perhaps upset) in a small way by a new Supreme Court decision. In *Steiner v. Mitchell*, 350 U.S. 247, 76 S. Ct. 330, 100 L. Ed. 267 (1956), the Justices held that the Portal-to-Portal Act did not cover the time spent donning and doffing of special clothing and time spent showering, in facilities required by state law, to protect workers dealing with dangerously caustic and toxic materials. And, since the Portal-to-Portal Act did not apply, the time was to be treated as compensable work under the Fair Labor Standards Act.

Steiner was an understandable reaction – after all, the dangers were extreme and unique to the job – and the decision effectively invoked a verbal formula culled from the legislative history of the Act, 350 U.S. at 256, 76 S. Ct. 330 (concluding that pre-shift and post-shift activities are compensable if they are an "integral and indispensable" part of the principal activity); but the tension with the Portal-to-Portal Act's underlying policy has been less easy to escape as *Steiner* has been extended.

One such extension by the lower courts embraced protective clothing necessitated by less extreme health or safety concerns, although the precedents are not uniform.[12] However, the more serious problem for employers arises in cases

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[12] *Compare, e.g., Alvarez v. IBP, Inc.*, 339 F.3d 894, 903 (9th Cir. 2003) (extending Steiner to such items as sanitary aprons) with *e.g., Reich v. IBP, Inc.*, 38 F.3d 1123, 1126 (10th Cir. 1994) (holding that the donning and doffing of sanitary outergarments, although required, was not integral and indispensable); *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556, 563 (E.D. Tex. 2001)(same), *aff'd*, 44 Fed. Appx. 652 (5th Cir. 2002).

such as this one by attempts to extend *Steiner* further to walking and waiting incident to such donning and doffing. This course may greatly extend the amount of time in question and may seem especially incongruous where the amount of time spent in actually donning and doffing clothes and equipment is generally pretty minimal.

The Secretary defends such an extension by combining *Steiner's* verbal formula – "integral and indispensable" – with another settled principle: that once the workday has begun with the first principal activity, anything else until the workday ends is compensable unless the employee is essentially on his own (e.g., lunch breaks). On this theory, a worker who picks up and puts on a required helmet at the plant entrance – an activity integral to a principal activity under *Steiner* (as extended by lower courts) – then must be compensated for everything else that happens (e.g., walking and waiting to pick up more equipment, walking to the time clock at the production floor entrance, waiting to punch in).

Yet, thus extended, the tension with the Portal-to-Portal Act becomes acute: after all, why is this complex of donning, doffing, waiting and travel within the Barber plant very different from the preliminary activities which were involved in the *Mt. Clemens* case – one of the targets of the Portal-to-Portal Act. Further, the legislative history and the Secretary's own regulations give examples of events excluded from compensable work – such as time spent waiting to punch in and time spent walking from plant gate to work bench – that appear at odds with her position in this case. *See* S. Rep. No. 80-48, at 47 (1947); 29 C.F.R. § 790.7.

The Secretary answers, in effect, that those examples assumed that no required helmet was donned at the entrance – but should this really convert everything after into compensable work when it would not otherwise be? In any event, the Secretary can cite a favorable result in the Ninth Circuit, see *Alvarez*, 339 F.3d at 906-07; but the Fifth and Tenth Cir-

cuits, addressing variants on this theme, have resisted the Secretary's result, although not for the same reasons.[13]

One further basis for resisting the Secretary derives from yet another principle from the Supreme Court, namely, that under certain circumstances time spent on a de minimis activity that is not the main activity of the worker should be disregarded. *See Mt. Clemens*, 328 U.S. at 692-93, 66 S.Ct. 1187. If the time spent donning and doffing is *de minimis*, can it also not be disregarded as starting the workday and allow courts to disregard the associated walking and waiting? Such a result is not on its face at odds with *Steiner* where the donning and doffing and showering were not claimed to be de minimis.

The Secretary replies that the *de minimis* concept has nothing to do with when the workday begins or ends but the *de minimis* concept is much fuzzier than the Secretary lets on: in the Supreme Court case that spawned it, the Court stated broadly that "compensable working time is involved" only "when an employee is required to give up a substantial measure of his time and effort." *Mt. Clemens*, 328 U.S. at 692, 66 S. Ct. 1187. So one could say that a *de minimis* activity which is non-compensable time under *Mt. Clemens* does not start of the workday, at least when preliminary to arrival "on the factory floor."

Thus, two positions are juxtaposed. One is the Secretary's mechanical combination of *Steiner* with a rigid "everything after is work" principle. The other is to treat required donning and doffing as compensable where more than *de minimis* but, where it is not, leaving both it and any associated walking and waiting time as non-compensable. Neither out-

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[13] *Anderson*, 147 F.Supp.2d at 563 n.12 (holding that "walk time" to employee's work station was not compensable), *aff'd*, 2002 WL 1396949 (5th Cir.); *Reich*, 38 F.3d at 1127 (upholding the denial of "walk and wait" time related to donning and doffing).

come is impossible analytically and neither is clearly dictated by Supreme Court precedent or underlying policy.

So where does the balance of advantage lie? Admittedly, the donning, doffing, waiting and walking involved are in the employer's service: but that was equally true in the *Mt. Clemens* case and Congress made a policy decision against required compensation. And, while the Secretary's interpretive view (although non-binding) is entitled to some deference, *United States v. Mead Corp.*, 533 U.S. 218, 228, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001), it is recent and offered only in litigation: no explicit regulation mandates the Secretary's outcome and the text of 29 C.F.R. § 790.7(g) n.49 points towards excluding the walking and waiting time.

On Barber's side, as already noted, the history and language of the Portal-to-Portal Act tend to favor Barber, as do two of the three circuit decisions; the question is how far *Steiner* has qualified the statute. Perhaps it is enough for a lower court that the Secretary's position is, in practical effect, a substantial step beyond *Steiner*. As *Steiner* itself tempers the Portal-to-Portal Act's main thrust, probably its extension should be left to the Supreme Court.

Finally, it appears that wages at the Barber plant were set against a background practice of treating as non-compensable the donning, doffing, walking and waiting involved in this case. Unless those wages are the federal minimum, a decision that now such time is compensable will likely be offset by wage adjustments in the future, leaving only a one-time windfall for employees. It is hard to begrudge this to workers doing difficult and disagreeable work, but the situation does bear an uncanny resemblance to that which prompted the Portal-to-Portal Act. It may be time for the Supreme Court to have another look at the problem.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE
No. 00-371-P-C.
ABDELA TUM, ET AL., PLAINTIFFS
v.
BARBER FOODS, INC., DEFENDANT

Jan. 23, 2002.

Recommended Decision Granting in Part and Denying in Part Defendant's Motion For Summary Judgment

COHEN, Magistrate Judge.

The defendant, Barber Foods, Inc., moves for summary judgment on all claims asserted by the forty-one named plaintiffs[1] against it in this action brought under the Fair Labor Standards Act. I recommend that the court grant the motion in part and deny it in part.

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the

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[1] The defendant has requested dismissal of sixteen of these plaintiffs as a sanction for failure to respond to the defendant's interrogatories as ordered in my Report of Final Pretrial Conference and Order (Docket No. 32) at 2. Barber Foods' Motion for Sanctions, etc. (Docket No. 37). I have recommended that this motion be granted. Recommended Decision on Defendant's Motion for Sanctions (Docket No. 40).

outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. FACTUAL BACKGROUND

The summary judgment record includes the following undisputed material facts appropriately supported in accordance with this court's Local Rule 56. The defendant is a secondary processor of poultry products at a single facility located in Portland, Maine.[2] Barber Foods' Statement of Ma-

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[2] Plaintiffs' Statement of Response to Barber Foods' Material Facts ("Plaintiffs' SMF") (Docket No. 29) provides no response to this and many other paragraphs of the defendant's statement of material facts. These paragraphs are accordingly deemed admitted, to the extent that they are supported by the citations to the summary judgment record given by the defendant. Local Rule 56(c). A cita-

terial Facts in Support of Motion for Summary Judgment ("Defendant's SMF") (Docket No. 22) ¶ 1.1; Affidavit of Peter Bickford ("Bickford Aff."), Exh. 3 to Defendant's SMF, ¶ 2. The defendant has two production shifts, each with six lines, three of which are "specialty" lines and three of which are "pack-out" lines. Defendant's SMF ¶ 1.2; Bickford Aff. ¶ 3. The product is assembled on the specialty lines. *Id.* After moving through the specialty lines and large spiral freezers, the product is pouched, packed and palletized on the pack-out lines. *Id.*

The production lines are staffed primarily by rotating associates, who generally rotate to different positions on the lines every two hours. Defendant's SMF ¶ 1.3; Bickford Aff. ¶ 4. There are 149 rotating associates on each shift. *Id.* In addition to rotating associates, each line has set up operators whose primary duties are to make sure that the various machines on the lines are operating smoothly. Defendant's SMF ¶ 1.4; Bickford Aff. ¶ 5. There are 34 set-up operators on each shift. *Id.*

The plaintiffs include seven associates currently employed by the defendant and 37 former employees. Defendant's SMF ¶ 2.1; Bickford Aff. ¶ 7. Twenty-six of the plaintiffs are or were rotating associates. Defendant's SMF ¶ 2.2 & Exh. 1 thereto. Two of the plaintiffs are employed as set-up operators; one plaintiff worked in the meat room; two plaintiffs worked in maintenance; two plaintiffs worked in shipping and receiving; eight plaintiffs worked in sanitation; and three plaintiffs work or worked in two job classifications. *Id.* The sanitation crew works on the third shift; the first two shifts are production shifts. Defendant's SMF ¶ 3.1; Bickford Aff. ¶ 9.

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tion to the defendant's statement of material facts followed by a citation to the summary judgment record will be made in this section of my recommended decision whenever I refer to such factual allegations.

Associates are expected to be on the production floor ready to work when their shift begins. Defendant's SMF ¶ 3.3; Plaintiffs' SMF ¶ 3.3. Associates are paid from the time they actually punch in. Defendant's SMF ¶ 3.3; Bickford Aff. ¶ 11. Associates are given paid breaks of 15 minutes in the first half of the shift and 10 minutes in the second half. Defendant's SMF ¶ 4.1; Bickford Aff. ¶ 12. In each break associates are given an extra paid five minutes to get to and from the production floor.[3] *Id.* Associates are also given an unpaid 30-minute meal break in the middle of each shift, along with an extra five paid minutes to get to and from the production floor. Defendant's SMF ¶ 4.2; Bickford Aff. ¶ 12.

All associates are required to wear the following sanitary and/or safety clothing or equipment before entering the production floor: lab coat, hairnet, beardnet (if applicable) and earplugs. Defendant's SMF ¶ 5.1; Affidavit of William Whittier ("Whittier Aff.") (Exh. 4 to Defendant's SMF) ¶ 2. Since October 15, 2001 all associates on the production floor have also been required to wear safety glasses. *Id.* Associates may also wear one or more of the following: vinyl gloves, cotton glove liners, vinyl aprons, sleeve covers, bump

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[3] The plaintiffs' statement of material facts includes a paragraph 4.1 which reads, in its entirety: "Barber Foods had not submitted credible evidence that its employees are paid for an extra 5 minutes of travel time per break." Plaintiffs' SMF ¶ 4.1. A statement to that effect in the defendant's statement of material facts is supported by citations to paragraph 12 of the Bickford affidavit and certain pages of the deposition of William Whittier, which are attached to the statement of material facts as Exhibit 11. Both of these citations support the allegation in the statement of material facts. If the plaintiffs' response is intended as an objection, it fails for lack of any identified basis. Questions of credibility are reserved for the trier of fact, but the party contesting credibility must provide the court with something beyond a conclusory assertion that the cited evidence is not credible before the court can determine whether such a situation exists. At a minimum, some evidence disputing the sworn evidence at issue must be cited.

hats, back belts, steel-toed boots, rain pants, steel mesh gloves, and lockout-tagout equipment. Defendant's SMF ¶ 5.2; Plaintiffs' SMF ¶ 5.2. The parties dispute the question whether the defendant requires associates to wear any of these additional items. Nets, earplugs, gloves, sleeve covers and aprons are dispensed by employees at the supply cage. *Id.* ¶ 5.4. Vinyl gloves, sleeve covers and aprons are also available from tubs on the production floor. Defendant's SMF ¶ 5.5; Whittier Aff. ¶ 6. Most associates who wear these items obtain them from the tubs. *Id.* All associates are offered the use of a locker in which they may store reusable clothing or equipment. Defendant's SMF ¶ 5.8; Whittier Aff. ¶ 9.

Rotating associates are required to wear lab coats, hair and beard nets, earplugs and safety glasses.[4] Defendant's SMF ¶ 6.1; Plaintiffs' SMF ¶ 6.1. Set-up operators are required to wear lab coats, hairnets, earplugs, safety glasses, steel-toed boots, bump hats and back belts and carry lock-out/tag-out equipment. Defendant's SMF ¶ 6.2; Plaintiffs' SMF ¶ 6.2. Set-up operators are also required at times to wear sleeves, rubber gloves or palletizing gloves. Plaintiffs' SMF ¶ 6.2; Deposition of Tadeusz Olszynski ("Olszynski Dep.") (Exh. 9 to Plaintiffs' SMF) at 5, 9-10.

Employees working in the meatroom are required to wear lab coats, hairnets, beardnets, earplugs, safety glasses, vinyl gloves, aprons, sleeve covers, steel-toed boots and back belts and to carry lock-out/tag-out equipment.[5] Defendant's

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[4] The plaintiffs contend that "some rotating associates are required to wear gloves" as well, Plaintiffs' SMF ¶ 6.1, but the record citation given for this assertion does not support it, and the defendant has appropriately objected to the statement on this basis. Barber Foods' Reply Statement of Material Facts ("Defendant's Reply SMF") (Docket No. 33) ¶ 6.1.

[5] The plaintiffs contend that these employees are also required to wear bump hats. Plaintiffs' SMF ¶ 6.3; Deposition of Ernest Levesque ("Levesque Dep.") (Exh. 4 to Plaintiffs' SMF) at 8.

SMF ¶ 6.3; Plaintiffs' SMF ¶ 6.3. Shipping and receiving employees are required to wear safety glasses, steel-toed boots and a bump hat or hard hat. *Id.* ¶ 6.4. They are also required to wear back belts. Plaintiffs' SMF ¶ 6.4; Deposition of Kevin Snow ("Snow Dep.") (Exh. 1 to Plaintiffs' SMF) at 24. These employees must pass through the production floor in order to punch in and punch out and must put on the gear required for production employees in order to do so. Plaintiffs' SMF ¶ 6.4; Snow Dep. at 9-10. Maintenance employees must wear safety glasses and steel-toed boots and carry lock-out/tag-out equipment. Defendant's SMF ¶ 6.5; Deposition of Jeffrey Shaw ("Shaw Dep.") (Exh. 12 to Defendant's SMF) at 12-13. Sanitation employees are required to wear lab coats, hairnets and beard nets, earplugs, safety glasses, gloves, rain pants, steel-toed boots and bump caps and to carry lock-out/tag-out equipment, hose nozzles and tool clips. Defendant's SMF ¶ 6.6; Affidavit of Cletis R. Bragg, Jr. (Exh. 10 to Defendant's SMF) ¶ 2.

Lab coats and cotton glove liners are laundered and reused. Defendant's SMF ¶ 7.1; Affidavit of Thomas Page ("Page Aff.") (Exh. 5 to Defendant's SMF) ¶ 2. Laundry bins are located at several points along the hallway from the production floor exits to the plant exits and associates drop the coats and liners in these bins on their way out of the plant. *Id.* Vinyl gloves, sleeve covers and aprons are disposable. Defendant's SMF ¶ 7.2; Page Aff. ¶ 3. Trash bins are located on the production floor and along the hallway from the production floor exits to the plant exits. *Id.* These items may be removed and deposited in the trash bins before punching out if the associate chooses. *Id.* Bump hats, back belts, safety glasses, steel-toed boots and reusable earplugs are retained by the associates and may be stored in a locker or taken home at their option. Defendant's SMF ¶ 7.3; Plaintiffs' SMF ¶ 7.3.

The defendant uses a computerized time-keeping system. *Id.* ¶ 8.1. Each associate has a swipe card with a bar code. *Id.* The system downloads clock punches into the payroll software. *Id.* Time clocks are located at the entrances

and exits to the production floor and at various other locations in the facility. *Id.* ¶ 8.2. Employees swipe their individual cards through the machine and the machine registers the punch. Plaintiffs' SMF ¶ 8.2; Deposition of Barber Foods, Inc. ("Page Dep.") (Exh. 11 to Plaintiffs' SMF) at 11. Rotating associates, set-up operators and meatroom associates generally punch in at a clock in the area where they will be working and punch out on the "out" clocks which are located next to the two primary exits. Defendant's SMF ¶ 8.3; Affidavit of Catherine Smith ("Smith Aff.") (Exh. 6 to Defendant's SMF) ¶ 3; Affidavit of Tyrone Ive ("Ive Aff.") (Exh. 7 to Defendant's SMF) ¶ 3; Affidavit of Douglas Goodwin ("Goodwin Aff.") (Exh. 8 to Defendant's SMF) ¶ 3; Deposition of Thomas Page (Exh. 13 to Defendant's SMF) at 99. Maintenance associates punch in on a time clock in the maintenance room. Defendant's SMF ¶ 8.3; Shaw Dep. at 25. Shipping and receiving associates punch in and out on the plant office clock located by the shipping and receiving office. Defendant's SMF ¶ 8.3; Affidavit of Timothy Scanlin ("Scanlin Aff.") (Exh. 9 to Defendant's SMF) ¶ 3. Sanitation associates punch in on the cafeteria clock and punch out at the plant office clock. Defendant's SMF ¶ 8.3; Bragg Aff. ¶¶ 3, 5.

During busier times, there may be lines at the coat racks and glove liner bins, the cage window or the time clocks. Defendant's SMF ¶ 10.3; Smith Aff. ¶ 7. During these times an associate may have to wait to obtain a coat and glove liners, to obtain items from the cage or to punch in. *Id.* An employee can spend between two and eight minutes in line at the supply cage. Plaintiffs' SMF ¶ 10.3; Deposition of Abdela Tum ("Tum Dep.") (Exh. 5 to Plaintiffs' SMF) at 30-32.

Associates on the production floor must be wearing lab coats, hairnets and earplugs before they can enter the production floor and punch in. Defendant's SMF ¶ 10.5; Smith Aff. ¶ 3. Gloves, aprons and sleeve covers are optional. *Id.* Most associates wear gloves; aprons and sleeve covers are worn by most associates on the specialty lines and infre-

quently by associates on the pack-out lines. *Id.* Gloves, aprons and sleeve covers are usually donned after punching in. Defendant's SMF ¶ 10.6; Smith Aff. ¶ 4.

Set-up operators don the required equipment and then punch in on the production floor. Defendant's SMF ¶ 10.8; Ive Aff. ¶ 3. Prior to punching out, they return to the cage any items they had checked out earlier. Defendant's SMF ¶ 10.9; Plaintiffs' SMF ¶ 10.9. After punching out, they deposit their coats, gloves and hairnets in the appropriate bins and may store other equipment in their lockers or take it home. *Id.* at ¶ 10.10.

Meatroom associates don the required equipment and punch in at the meatroom clock. Defendant's SMF ¶ 10.11; Goodwin Aff. ¶ 3. Gloves, aprons and sleeve covers may be deposited in the trash before punching out. Defendant's SMF ¶ 10.12; Goodwin Aff. ¶ 4. At the end of the shift, meatroom associates wash their boots if necessary. Defendant's SMF ¶ 10.12; Plaintiffs' SMF ¶ 10.12. Lab coats, gloves, hairnets, sleeve covers and aprons are deposited in laundry or trash bins; remaining items are stored in lockers or taken home. Defendant's SMF ¶ 10.12; Goodwin Aff. ¶ 4.

Shipping and receiving associates go to the shipping office and don coats, hairnets and earplugs before entering the production floor to punch in at the plant office clock. Defendant's SMF ¶ 10.13; Scanlin Aff. ¶ 3. After punching in they return to the shipping office to doff this equipment and go to their assigned area, unless they are going directly from the time clock to work on the production floor or in the freezer. *Id.* At the end of their shift, these associates must again don coats, hairnets and earplugs before entering the production floor to punch out at the plant office clock. Defendant's SMF ¶ 10.14; Scanlin Aff. ¶ 4. After punching out, they leave their coats in the shipping office and drop the hairnet and earplugs in the trash. *Id.*

Maintenance associates have their own time clock in

the maintenance department. Defendant's SMF ¶ 10.15; Shaw Dep. at 25. Any required clothing or equipment is put on after punching in. Defendant's SMF ¶ 10.15; Shaw Dep. at 28. At the end of the shift, these associates doff all equipment before punching out. Defendant's SMF ¶ 10.16; Plaintiffs' SMF ¶ 10.16.

Sanitation workers punch in on the cafeteria clock. Defendant's SMF ¶ 10.17; Bragg Aff. ¶ 3. There is a nightly meeting in the cafeteria, after which the associates go upstairs to work. *Id.* At the end of the shift, these associates wash their rain pants and tools while on the clock and then punch out at the plant office clock. Defendant's SMF ¶ 10.19; Bragg Aff. ¶ 5. They then deposit their coats, glove liners, hairnets and gloves in the appropriate bins and reusable items of equipment in their lockers. *Id.*

Associates are free to leave the premises during their unpaid break. Defendant's SMF ¶ 11.1; Bickford Aff. ¶ 19. Lab coats must be removed if an associate leaves the premises or uses the bathroom. Defendant's SMF ¶ 11.2; Whittier Aff. ¶ 10. Gloves, aprons and sleeve covers also must be removed when an associate uses the bathroom. *Id.*

The defendant has a medical office that is staffed by a nurse from 6:00 a.m. to 6:30 p.m. Monday through Friday and by a physician from 2:00 p.m. to 5:00 p.m. Tuesdays and Thursdays. Defendant's SMF ¶ 12.1; Bickford Aff. ¶ 20. Appointments with this office are initially made by an associate's crew lead. Defendant's SMF ¶ 12.2; Bickford Aff. ¶ 21. If an associate needs to visit the office on other than an emergency basis, the crew lead checks the available appointment times on the computer and generally tries to schedule the associate for the next available slot. *Id.* Appointments cannot be scheduled during an associate's meal break on the second and third shifts because the medical office is not staffed when those meal breaks occur. Defendant's SMF ¶ 12.4; Bickford Aff. ¶ 23.

Plaintiff Toan Dang left the employ of the defendant

on April 2, 1998; plaintiff Mohammad Habibzai left the employ of the defendant on May 7, 1998; and plaintiff Lee LaCroix left the employ of the defendant on July 22, 1998. Defendant's SMF ¶ 13.3; Bickford Aff. ¶ 26.

III. DISCUSSION

The complaint alleges that the defendant violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, by failing to keep accurate time records resulting in the denial of regular and overtime compensation and by permitting or requiring employees to perform integral and indispensable activities for its benefit before and after the regular paid work shift and during unpaid breaks. Complaint (Docket No. 1) at 19-20. The defendant seeks summary judgment on these claims. Due to the nature of the evidence presented in the summary judgment record, different groups of employees must be considered separately with regard to each of these claims.

A. Statute of Limitations

The defendant contends that the claims of ten plaintiffs who left its employ more than two years before the complaint was filed or their written consents as opt-in plaintiffs were filed are barred by the applicable statute of limitations. Barber Foods' Memorandum in Support of Motion for Summary Judgment ("Motion"), attached to Barber Foods' Motion for Summary Judgment (Docket No. 21) at 21-23. The applicable statute provides that actions based on claims like those raised by these plaintiffs "may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." 29 U.S.C. § 255(a). An action is considered to have been commenced on the day the complaint was filed for named plaintiffs and on the date when a written consent to become a party plaintiff is filed for all plaintiffs not named in the original

complaint. 29 U.S.C. § 256(a). The plaintiffs respond that there is sufficient evidence to support a finding that the defendant's alleged violations of the FLSA were willful, making the three-year period applicable. Plaintiffs' Memorandum in Opposition of [sic] Barber Food's Motion for Summary Judgment ("Opposition") (Docket No. 30) at 15-16.

Even if the three-year period were applicable, it is undisputed that the written consents of plaintiffs Mohammad Habibzai and Toan Dang were filed in this court on June 18, 2001, Docket No. 16, more than three years after they each left the employ of the defendant. Defendant's SMF ¶ 13.3. Accordingly, summary judgment should be entered against them. *See Bolduc v. National Semiconductor Corp.*, 35 F. Supp. 2d 106, 116 (D.Me. 1998).

"[A]n employer acts willfully for the purposes of the FLSA's statute of limitations if it knew or showed reckless disregard for the matter of whether its conduct was prohibited by the FLSA." *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 679 (1st Cir. 1998) (citation and internal quotation marks omitted). Here, the plaintiffs rely, Opposition at 15-16, on the defendant's assertion that Peter Bickford, its "human resources business partner," who is primarily responsible for monitoring the defendant's compliance with the FLSA, attended annual seminars on labor and employment issues and subscribed to numerous periodicals which deal with current issues under the FLSA. Defendant's SMF ¶ 13.2. Asserting in conclusory fashion that the defendant's violation of the FLSA as alleged is "clear," the plaintiffs then draw the conclusion that the defendant must have known through Bickford that its conduct violated the FLSA or at least recklessly disregarded the possibility that its conduct violated the FLSA. Opposition at 15-16. However, as will become apparent later in this recommended decision, even if the defendant's conduct occurred as alleged by the plaintiffs, to the extent that those allegations are supported in the summary judgment record, it is far from clear that the conduct at issue violated the FLSA. The First Circuit noted in *Baystate*

that the applicable standard for a willful violation of the FLSA was established by *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988), which rejected a negligence standard for liability. 163 F.3d at 679, 681. Where, as here, "legitimate disagreement" may exist with respect to application of the FLSA to a specific set of facts, a court should be reluctant to find a knowing violation of the FLSA. *Id.* at 680. An employer does not act willfully even if it acts unreasonably in determining whether it is in compliance with the FLSA. *Id.* at 681.

The plaintiffs argue that willfulness must always be determined by the factfinder. Opposition at 15. However, the First Circuit has held that, where no genuine issue of material fact is raised on the summary judgment record, summary judgment on this issue is appropriate. *Lopez v. Corporación Azucarera de Puerto Rico*, 938 F.2d 1510, 1515-16 (1st Cir. 1991). I conclude, given the closeness of the substantive questions raised by the plaintiffs under the FLSA and the lack of dispositive authority, as discussed more thoroughly below, that there is no genuine issue of material fact as to the defendant's knowledge that its alleged actions violated the FLSA or as to any reckless disregard by the defendant of the possibility that its alleged actions violated the FLSA. Accordingly, the claims of the following plaintiffs are barred by the two-year statute of limitations and the defendant is entitled to summary judgment against them: Mark Aitkenhead, Shaun Albair, William Devine, Diane Keraghan, Lee LaCroix, Gordon Lemire, Gladstone Lewis and Kyra Pardue. Docket No. 16 & Exh. 1 to Defendant's SMF.

B. Pre-Shift and Post-Shift Activities

The plaintiffs seek compensation for time spent (i) walking from the plant entrance to the places where they obtain the clothing and equipment they wear while working and then to the time clocks where they punch in, Complaint ¶ 20; Opposition at 8; (ii) waiting in line to obtain clothing and equipment or to punch in, Opposition at 8, 10; (iii) putting on

clothing and equipment, Complaint ¶ 20; and (iv) removing clothing and equipment and placing it in bins or lockers, Complaint ¶ 23, Opposition at 8.[6] The defendant relies in significant part on the Portal-to-Portal Act, 29 U.S.C. § 254, in support of its motion for summary judgment on these claims. That statute provides, in pertinent part:

> [N]o employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended ... on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee . . . -
>
> (1) walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. § 254(a). The term "principal activity or activities" "embraces all activities which are an integral and indispensable part of the principal activities." *Steiner v. Mitchell,* 350 U.S. 247, 252-53 (1956) (citation and internal quo-

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[6] The defendant contends that the plaintiffs also seek compensation for "the time it takes . . . to walk from the clocks where they punch out to their lockers, if they use them, and then to the plant exits." Motion at 4. I find no such allegation in the complaint or in the plaintiffs' opposition to the motion for summary judgment.

> tation marks omitted). "[A]ctivities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed . . . ." *Id.* at 256.

Walking from the plant entrance to a workstation or actual place of performance of the employee's principal work activity is not compensable. 29 C.F.R. § 790.7(e) & (f); *Pressley v. Sanderson Farms, Inc.*, 143 Lab. Cas. ¶ 34,262, 2001 WL 850017 (S.D. Tex. Apr. 23, 2001), at *2-3. The plaintiffs here attempt to combine this time with time spent waiting to punch in or to obtain necessary clothing or equipment, but time spent waiting in line to punch in or out is also not compensable under the FLSA. 29 C.F.R. §§ 790.7(g); 790.8(c). With respect to the time spent waiting to pick up clothing or equipment, the plaintiffs rely on *Amos v. United States*, 13 Cl. Ct. 442 (1987), Opposition at 6-7, but in that case the employer conceded that the time spent procuring and returning keys, a radio and a body alarm was compensable under the FLSA, 13 Cl. Ct. at 448. The Court of Claims held that "once [the plaintiffs] had the keys and other equipment items in their possession, [they] in effect had reported for duty," *id.* at 449, and found the time spent walking to duty stations thereafter to be compensable, *id.* at 450. Here, the plaintiffs claim compensation for the time spent before obtaining their clothing and equipment. Based on the statutory and regulatory language quoted above, as well as the case law, that time is not spent in activity that could reasonably be construed to be an integral part of employees' work activities any more than walking to the cage from which hairnets and earplugs are dispensed is to be so considered.

The defendant is entitled to summary judgment on any claims based on time spent walking from the plant entrances to an employee's workstation, locker, time clock or site where

clothing and equipment required to be worn on the job is to be obtained and any claims based on time spent waiting to punch in or out or for such clothing or equipment.

With respect to claims based on the donning and doffing of equipment, the available case law varies in its application of section 254. Before considering that case law, however, it is necessary to address the defendant's argument that maintenance employees are paid for any time spent donning and doffing equipment and that sanitation employees are paid for time spent donning equipment. Motion at 10. The plaintiffs do not respond to this argument, but the court must nonetheless consider it on the merits in the context of summary judgment. *Lopez*, 938 F.2d at 1517.

The defendant's contention that maintenance employees are paid for time spent doffing clothing and equipment, Defendant's SMF ¶ 10.16, is supported by the citation and not denied by the plaintiffs' response, Plaintiffs' SMF ¶ 10.16 (maintenance employees take off equipment and clothing "before punching out").[7] Accordingly, the defendant is entitled to summary judgment on any claim by maintenance employees for compensation for time spent doffing clothing and equipment or engaged in other activities post-shift. With respect to the donning of clothing and equipment by maintenance employees, the plaintiffs challenge the defendant's assertion that "[a]ny required clothing or equipment is put on after punching in," Defendant's SMF ¶ 10.15, with the statement that "[m]aintenance employees are required to obtain

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[7] The corresponding paragraph of the plaintiffs' statement of material facts is not supported by the citation given. As stated, it cannot reasonably be interpreted as anything other than an agreement with the defendant's statement. The fact that it is not supported by the citation given also means that the corresponding paragraph in the defendant's statement of material facts must be deemed admitted so long as it is supported by the record citation given, which is the case here. *See* Shaw Dep. at 30-31.

much of their required gear before clocking in," Plaintiffs' SMF ¶ 10.15. While the plaintiffs offer only the interrogatory responses of a single employee to support their assertion that all maintenance employees are required to obtain "much of" their required gear before punching in and that it "typically" takes 10-15 minutes to walk from the entrance of the building to a locker,[8] get equipment and don clothing and equipment, *id.*, and while, strictly speaking, "obtaining" equipment is not the same thing as putting it on, so that the plaintiffs' statement is not directly responsive to the defendant's factual assertion, this evidence is sufficient, although barely, to create a disputed issue of material fact on the question whether pre-shift donning activity is paid for by the defendant. Summary judgment for the defendant is not appropriate on this issue.

With respect to sanitation employees, the defendant asserts that "[a]ssociates are paid to get ready," and that they "may obtain and don their clothing and equipment before going to the cafeteria to punch in if they wish, but this would be at their option, it is not required." Defendant's SMF ¶ 10.18. The plaintiffs' response, again supported by the interrogatory responses of a single plaintiff, represents that "[s]anitation workers must obtain" their clothing and equipment and don it prior to punching in. Plaintiffs' SMF ¶ 10.18. Again, giving the plaintiffs the benefit of the inferences available to the party opposing summary judgment, the fact that two supervisors told a single sanitation employee that he "would be reprimanded" if he "did not have all [his] protective clothing, gear, and equipment on when it was time to punch in," Plaintiff Albert R. Howard, Jr.'s Answers to Defendant Barber Foods' Interrogatories ("Howard Int.") (Exh. 22 to Plaintiffs' SMF), Answer to Interrogatory No. 5, is sufficient to raise a dispute concerning an issue of material fact on this claim. The defendant accordingly is not entitled to summary judgment on the pre-shift "donning" claim for compensation by

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[8] I have already determined that such time is not compensable under the FLSA.

sanitation employees.

1. Activities as "Work."

The remaining donning and doffing claims may be discussed together. The defendant contends that these activities are not "work" within the meaning of the FLSA and that the time spent in these activities is in any event *de minimis*, taking it outside the requirements of the FLSA as a matter of law. Motion at 10-15. The plaintiffs challenge both of these arguments. Opposition at 2-14. Changing clothes "when performed under the conditions normally present, would be considered 'preliminary' or 'postliminary' activities, 29 C.F.R. § 790.7(g), and thus not compensable under the Portal-to-Portal Act, but "an activity which is a 'preliminary' or 'postliminary' activity under one set of circumstances may be a principal activity under other conditions," *id.* § 790.7(h), and thus compensable. "The term 'principal activities' includes all activities which are an integral part of a principal activity." 29 C.F.R § 790.8(b).

> Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity.

Id. § 790.8(c). *See also id.* n. 65 ("Such a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work.") The First Circuit has noted that courts may determine whether disputed activities are preliminary or postliminary for purposes of the FLSA. *Ballou v. General Elec. Co.*, 433 F.2d 109, 111 (1st Cir. 1970).

I conclude that the donning and doffing of clothing

and equipment required by the defendant or by government regulation, as opposed to clothing and equipment which employees choose to wear or use at their option, is an integral part of the plaintiffs' work for the defendant. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692-93 (1946); *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944) ("physical or mental exertion . . . controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business"). This is admittedly a close question. Several courts have held otherwise in cases that appear close on their facts to the claims presented here.

In *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994), the Tenth Circuit upheld a trial court's FLSA decision, finding that "the placement of a pair of safety glasses, a pair of earplugs and a hardhat into or onto the appropriate location on the head takes all of a few seconds and requires little or no concentration," so that these activities did not meet the "physical or mental exertion" prong of the *Muscoda* test, and accordingly could not be considered "work" under the FLSA. *Id.* at 1125-26. However, the court also upheld the trial court's finding that workers who required special safety equipment including "some combination of" aprons, belly guards, mesh sleeves or arm guards, wrist wraps, gloves, rubber boots, belts and shin guards should be compensated under the FLSA for the time involved in donning, doffing and cleaning these items. *Id.* at 1124-25. Among the reasons given for the distinction were that the safety gear used by the latter group of employees was uniquely required by the dangers of the production jobs being performed and that the donning, doffing and cleaning activities required physical exertion, time and "a modicum of concentration." *Id.* at 1125, 1126. Here, the facts suggest a scenario that is somewhere between the two groups described in *IBP*. The time required for donning and doffing is hotly disputed. The parties offer little in the way of evidence about the necessity of any of the clothing or equipment at issue for safety of the employees,

although the plaintiffs offer some general statements, not specifically tied to their jobs or the clothing and equipment at issue, about the potential hazards of work in the plant.[9] Plaintiffs' SMF ¶¶ 5.2(a)-5.2(c). I do not find *IBP* persuasive for purposes of the present motion.

In *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556 (E.D. Tex. 2001), the court held, after trial, that employees were not entitled to compensation for the donning and doffing of sanitary and safety equipment under the FLSA because the employees wore clean outer garments to protect their street clothes from becoming soiled and changing into and out of such garments was not integral and indispensable to their principal jobs. *Id.* at 563. The clothing at issue was earplugs, hairnets, cotton "frocks," rubber aprons, rubber gloves and cotton gloves. *Id.* at 562. The court found that "the donning and doffing of these items does not involve 'physical or mental exertion'" due to the fact that the donning and doffing "takes seconds to accomplish and requires very little concentration," and therefore did not qualify as work under the FLSA. *Id.* at 561. Here, the defendant has submitted evidence that the activities at issue may take from 1 to 5 minutes pre-shift, Defendant's SMF ¶¶ 10.4, 10.8, 10.11, 10.20, and from 1 to 4 minutes post-shift, *id.* ¶¶ 10.7, 10.10, 10.12, 10.14, 10.20. The plaintiffs suggest that the pre-shift activities take between 8 and 36 minutes, Plaintiffs' SMF ¶¶

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[9] The defendant failed to provide a response to these and certain other paragraphs of the plaintiffs' statement of material facts that presented new facts in addition to those submitted initially by the defendant after I ordered it to do so if it did not wish those paragraphs to be deemed admitted. Order (Docket No. 36) at 2. Accordingly, they have been deemed admitted to the extent that they are appropriately supported by citations to the summary judgment record.

10.3, 10.3(b), 10.4, 10.6, 10.8, 10.11, 10.19-10.20,[10] and the post-shift activities take from 7 to 25 minutes, *id.* ¶¶ 10.7(a), 10.9, 10.10, 10.12, 10.14, 10.16, 10.19-10.20. While it appears that most of the clothing and equipment involved would require very little concentration to don or doff, it is far from clear on this record that this could be accomplished in seconds. Again, I do not find *Anderson* to be persuasive.

Finally, in *Pressley,* the trial court found in the context of summary judgment, citing *IBP,* that a claim under the FLSA for compensation for time spent donning, doffing and cleaning a smock, apron, cotton or rubber gloves, rubber sleeves, a hairnet and earplugs "fails as a matter of law." 2001 WL 850017 at *2-3. The opinion provides no analysis in support of this conclusion.

The First Circuit has stated that

> [t]he activity is employment under the Act if it is done at least in part for the benefit of the employer, even though it may also be beneficial to the employee. The crucial question is not whether the work was voluntary but rather whether the employee was in fact performing services for the benefit of the employer with the knowledge and approval of the employer.

Secretary of Labor v. E.R. Field, Inc., 495 F.2d 749, 751 (1st Cir. 1974) (citation and internal punctuation omitted). The First Circuit attached particular significance to the fact that the Portal-to-Portal Act does not cover any work of consequence performed for an employer, citing 29 C.F.R. § 790.8(a). *Id.* On this record, I cannot conclude that the plain-

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[10] These figures apparently include time spent walking from plant entrances to time clocks or to sites where clothing and equipment could be obtained and time waiting in line to punch in or to obtain equipment, both of which are not compensable. It is not possible in most cases to determine from the plaintiffs' submissions how much of the total stated times is accounted for by those activities.

tiffs were not performing services for the benefit of the defendant when they donned and doffed the required equipment.

I do find persuasive the reasoning of the court in *Lee v. Am-Pro Protective Agency, Inc.*, 860 F. Supp. 325, 326-27 (E.D. Va. 1994), supporting its holding on a motion for summary judgment that the employer defendant was not entitled to summary judgment on a claim under the FLSA for compensation for time spent changing into clothing required by the employer for its security guard employees. *See also Dunlop v. City Elec., Inc.*, 527 F.2d 394, 397-401 (5th Cir. 1976) (test is whether activities in question performed as part of regular work of employees in ordinary course of business and are necessary to business and performed primarily for benefit of employer). The donning and doffing at issue here are not excluded from compensation under the Portal-to-Portal Act as preliminary or postliminary activities.

2. Whether the activities are "*de minimis*."

Activity which may be considered work under the FLSA, not excluded from compensability by the Portal-to-Portal Act, may nonetheless not require compensation under the FLSA if it involves only a few minutes of work beyond the scheduled working hours. *Anderson*, 328 U.S. at 692. "It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved." *Id.* Courts weight four facts to determine whether an activity is *de minimis* as a matter of law for purposes of an FLSA claim:

> (1) the amount of daily time spent on the additional work; (2) the administrative difficulty in recording the time; (3) the size of the aggregate claim; and (4) the regularity of the work.

Anderson, 147 F. Supp. 2d at 564; *Pressley*, 2001 WL 850017 at *3. "Most courts have found daily periods of approximately 10 minutes *de minimis* even though otherwise compensable." *Lindow v. United States*, 738 F.2d 1057, 1062

(9th Cir. 1984) (citing cases).

Here, the amount of daily time spent on the activities at issue is very much in dispute. The defendant expresses concern about the administrative difficulty that would be involved in recording this time, Motion at 15, but employees are required to engage in these activities every day, and the scope of the activities does not change from day to day. Thus, there should be little or no variation in the time spent on these activities by each employee from day to day. *See also* 29 C.F.R. § 785.47 ("An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable working period of time he is regularly required to spend on duties assigned to him."). The defendant does not suggest that it could not practically establish rules allowing each employee to punch in before donning and to punch out only after doffing the clothing and equipment at issue, while excluding time spent socializing, walking or waiting, Motion at 15. The lack of such information does not mean that the plaintiffs are entitled to recover but merely precludes the entry of summary judgment in the defendant's favor on the basis of this record. I have already mentioned the regularity of the work. Given the number of employees on each of the defendant's two shifts, the size of the aggregate claim could be quite large. These factors also counsel against the entry of summary judgment on the basis of the *de minimis* rule.

C. Meal Break

The plaintiffs contend that the defendant provides less than the 30-minute meal break required by law and requires them to use the bathroom during the unpaid meal break, so that the available time is further reduced by the need to remove and re-don the required clothing and equipment. Complaint ¶ 21. The defendant makes the same arguments with respect to this claim; that these activities are not work within the meaning of the FLSA and that the time involved is in any event *de minimis*. Motion at 16.

The defendant first contends that this claim cannot be raised by sanitation associates, "who are paid from punch in to punch out with no deduction for an unpaid meal break," or to maintenance or shipping and receiving employees. *Id.* The plaintiffs do not respond to this argument but their response to the paragraph in the defendant's statement of material facts cited by the defendant in support of this argument does dispute the necessary underlying factual assertion with respect to maintenance employees. The plaintiffs again generalize from the interrogatory response of a single sanitation employee, Plaintiffs' SMF ¶ 4.4, who details his activities during a 30-minute break in response to an interrogatory seeking a description of "all work performed by you . . . for which you claim you were entitled to be paid but were not paid for [sic]," Howard Int. at [4], Interrogatory No. 12 & Answer thereto. With the benefit of a reasonable inference, this evidence raises a disputed issue of material fact that precludes summary judgment on this aspect of the plaintiffs' claims. The fact that a review of this employee's payroll records demonstrates that he was paid from punch in to punch out with no deduction for any unpaid lunch break, Barber Foods' Reply Statement of Material Facts ("Defendant's Reply SMF") (Docket No. 33) ¶¶ 4.4, 8.4 [sic]; Affidavit of Peter Bickford (Exh. 1 thereto) ¶ 3; Payroll record (Exh. 3 thereto), provides impeachment evidence but does not permit the court to disregard the employee's sworn statement in the context of a motion for summary judgment.

The outcome is different for maintenance and shipping and receiving associates. The defendant's statement of material facts, unchallenged by the plaintiffs in this regard, establishes that employees must remove lab coats, gloves, aprons and sleeve covers in order to use the bathroom. Defendant's SMF ¶ 11.2, Whittier Aff. ¶ 10; Plaintiffs' SMF ¶¶ 11.1-11.2. The defendant's statement that maintenance employees are required to wear only safety glasses, steel-toed boots and lock-out/tag-out equipment is not challenged by the plaintiffs. Defendant's SMF ¶ 6.5, Shaw Dep. at 12-13.

Maintenance employees are required to wear a lab coat when they enter the production floor, *id.*, but even assuming that such an employee's lunch break would occur while he or she was on the production floor, doffing the coat on the way off the floor can hardly consume more than a few seconds, a *de minimis* period of time. The defendant's statement of material facts also establishes that shipping and receiving associates are required to wear only safety glasses, steel-toed boots and a bump hat or hard hat. Defendant's SMF ¶ 6.4, Scanlin Aff. ¶ 2. The plaintiffs' SMF adds a back belt to this list, Plaintiffs' SMF ¶ 6.4, but that is not an item that needs to be doffed in order to use the bathroom. These employees are also required to wear a lab coat when on the production floor, Defendant's SMF ¶ 6.4, Plaintiffs' SMF ¶ 6.4, but the same considerations discussed with respect to maintenance employees apply here. The defendant is entitled to summary judgment on any lunch break/bathroom use claims raised by maintenance and shipping and receiving employees.

An employer need not be compensated for bona fide meal periods, during which the employee "must be completely relieved from duty for the purposes of eating regular meals" and which must ordinarily consist of 30 minutes or more. 29 C.F.R. § 785.19(a). The evidence concerning the question whether the defendant provides those of its employees whom it does not pay for a 30-minute period in each work day, on a regular basis, with at least 30 minutes of time during which they are "completely relieved from duty" cannot be determined on the basis of the summary judgment record. The defendant contends that employees are given an extra five minutes of paid time to get to and from the production line in connection with the lunch break, Defendant's SMF ¶ 4.2, which the plaintiffs do not dispute, and that the 30-minute meal break "starts when the last associate leaves the line," Defendant's Reply SMF ¶ 11.1-11.2. These facts, it contends, suffice to establish as a matter of law that no employee receives less than 30 minutes of lunch break time. Motion at 17.

However, the plaintiffs have provided the testimony of two employees to the effect that they did not in fact receive 30-minute lunch breaks. Plaintiffs' SMF ¶¶ 11.1-11.2, 11.3; Deposition of Ernest Levesque (Exh. 4 to Plaintiffs' SMF) at 39-41; Deposition of Celso Florendo (Exh. 2 to Plaintiffs' SMF) at 48. Coupled with their assertions that the time required to doff and don required clothing and equipment in order to eat is more than *de minimis,* Plaintiffs' SMF ¶ 11.3; Howard Int. at [4] (Answer to Interrogatory No. 12); Plaintiff Allison Carey's Answers to Defendant Barber Foods' Interrogatories (Exh. 21 to Plaintiffs' SMF) at [4] (Answer to Interrogatory No. 12); Plaintiff Kenneth LaMarche's Answers to Defendant Barber Foods' Interrogatories (Exh. 24 to Plaintiffs' SMF) at [4]-[5] (Answer to Interrogatory No. 15), a fact-based assertion which for the reasons discussed previously cannot be determined on the basis of the summary judgment record, the plaintiffs have raised a disputed issue of material fact on this claim.

With respect to the plaintiffs entitled to raise a claim concerning bathroom breaks, the record supports the defendant's position. The defendant notes that "there is no evidence that associates cannot use the bathroom if necessary during the shift," and points out that all employees are given a 15-minute paid break in the first half of the shift and a 10-minute paid break in the second half, in addition to the lunch break. Motion at 16-17. They are also given an additional five paid minutes in connection with each break to get to and from the production floor. Defendant's SMF ¶ 4.1; Bickford Aff. ¶ 12. The defendant also argues that removing a lab coat, gloves, apron and sleeve covers in order to use the bathroom is not work within the scope of the FLSA and that the time involved is in any event *de minimis.* Motion at 17-19. The plaintiffs respond that bathroom break activities "take substantially more time and effort than alleged by" the defendant, Opposition at 10, and that the defendant "has admitted that it suggests to employees that they use their lunch break or other break to use the restroom," *id.* at 11. They assert in conclu-

sory fashion that this "effectively . . . force[s] employees to perform compensable work during unpaid break time." *Id.* This minimalist argument is insufficient. Even if the evidence could reasonably be interpreted to allow an inference that a "suggestion" by management about when employees should use the bathroom has the practical force of a requirement, an inference that cannot be reasonably drawn on the basis of the existing summary judgment record,[11] the plaintiffs have made no attempt to show that using the bathroom as recommended during one of the paid breaks is not practically possible for employees. Under these circumstances, the defendant is entitled to summary judgment on the plaintiffs' claims based on use of the bathrooms, because the plaintiffs have not offered sufficient evidence to allow a reasonable jury to find in their favor on this claim.

D. Medical Visits

The defendant contends that the evidence is insufficient to allow the plaintiffs to proceed with their claim that they are sometimes ordered to use their unpaid break time to visit the plant nurse's office. Motion at 19-21. The applicable regulation provides:

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[11] In connection with their argument on their final claim, discussed below, the plaintiffs assert that a recommendation from management that employees visit the plant nurse's office during lunch break "surely carries great weight for an at will employee and is tantamount to a command. *See* Barber Foods Associate Handbook." Opposition at 14. This assertion is not supported by a reference to, or indeed an entry in, the plaintiffs' statement of material facts and therefore will not be considered by the court. In addition, the lack of a pinpoint citation to a page or pages in the document, as well as any indication where in the record the document may be found, makes the citation too general to be of any use to the court. It is not the court's role to search through the summary judgment record for material that might support a party's factual assertions. *Pew v. Scopino,* 161 F.R.D. 1, 1 (D.Me. 1995).

> Time spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when he is working constitutes hours worked.

29 C.F.R. § 785.43.

The defendant first argues out that this claim cannot be raised by sanitation workers, because they only work on the third shift, when the plant medical office is not staffed, nor by any second-shift workers, because the medical office is not staffed when the second-shift meal period is taken. Motion at 20. The plaintiffs do not respond to the argument concerning sanitation workers. The medical office at the defendant's plant is staffed from 6:00 a.m. to 6:30 p.m. Monday through Friday. Defendant's SMF ¶ 12.1; Bickford Aff. ¶ 20. The defendant's first shift runs from 6:30 a.m. to 3:00 p.m., its second shift runs from 3:45 p.m. to 12:15 a.m., and its third shift runs from 11:30 p.m. to 6:30 a.m. Defendant's SMF ¶ 3.1; Bickford Aff. ¶ 9. All sanitation workers work on the third shift. Defendant's SMF ¶ 3.2; Bickford Aff. ¶ 10. Obviously, no sanitation worker could receive medical attention on the premises during his or her normal working hours. The plaintiffs make no claim that any sanitation workers received medical attention at any other location at the direction of the defendant during the third shift. Accordingly, the defendant is entitled to summary judgment on any claim concerning medical attention raised by sanitation workers.

With respect to second-shift workers, the plaintiffs do not dispute the defendant's assertion that the medical office is closed during the meal break. Instead, they argue that the applicable regulation is violated because second-shift employees "typically must visit the nurse before their shift begins and before they clock in." Plaintiffs' SMF ¶¶ 12.2-12.5. The plaintiffs offer the testimony of two individuals, each of whom was scheduled once to visit the nurse before the start of the second shift, in support of this assertion. Tum Dep. at 52-

53; Olszynski Dep. at 47-48. Even if the plaintiffs were given the benefit of an inference that these individuals' experience was "typical," however, the scheduling of medical visits before an employee's shift begins at 3:45 p.m. does not, for all that appears in the summary judgment record, require that employee to wait for or receive that attention during his or her normal working hours. Therefore, the evidence would not allow a factfinder to conclude that the regulation was violated. The defendant is entitled to summary judgment on this claim insofar as it is raised by second-shift workers.

With respect to first-shift workers, the plaintiffs provide evidence only that two supervisors "recommended" that an employee visit the medical office during lunch break. Plaintiffs' SMF ¶ 12.2-12.5; Levesque Dep. at 42. For the reasons discussed earlier, *see* footnote 10, the plaintiffs cannot convert such a recommendation into evidence that any employee actually was required to do so. Even plaintiff Levesque testified that he was not required to do so. Levesque Dep. at 42. The defendant points out, correctly, that there is no evidence in the summary judgment record that any of the plaintiffs was required to visit the medical office during lunch break and was not paid for that time. Barber Foods' Reply Memorandum (Docket No. 34) at 5-6; Defendant's Reply SMF ¶ 12.2-12.5. The only other evidence from a first-shift employee cited by the plaintiffs, Plaintiffs' SMF ¶¶ 12.2-12.5, and therefore the only evidence that the court may consider in connection with this motion for summary judgment, is the deposition testimony of plaintiff Tum, who testified that since he had been working on the first shift, he had not been required to see the nurse during his lunch breaks. Tum Dep. at 53.

Tum also testified that management did require "some people" to see the nurse during the lunch break or made appointments for them to see the nurse at that time. *Id.* If the plaintiffs meant to invoke this testimony in their statement of material facts, it still does not support the necessary additional element of such a claim that the employees involved were not

paid for the time so spent. The defendant's evidence that employees who have medical appointments scheduled during their meal breaks "because this was the only available slot" are paid for the time involved and allowed to take the entire meal break before or after the appointment, Defendant's SMF ¶ 12.4, Bickford Aff. ¶ 23, is not challenged by any evidence identified by the plaintiffs in their statement of material facts. The summary judgment record would not allow a reasonable factfinder to conclude that the defendant violated the applicable regulation with respect to its first-shift employees.[12] Accordingly, the defendant is entitled to summary judgment on all first-shift medical-visit claims.

IV. CONCLUSION

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be GRANTED as to the following claims: (i) all claims asserted by plaintiffs Mohammad Habibzai, Toan Dang, Mark Aitkenhead, Shaun Albair, William Devine, Diane Keraghan, Lee LaCroix, Gordon Lemire, Gladstone Lewis and Kyra Pardue; and (ii) all claims asserted by the remaining defendants based on (a) time spent walking from the plant entrances to an employee's work station, locker, time clock or site where clothing or equipment is to be obtained; (b) time spent waiting to punch in or out or for clothing or equipment to be dispensed; (c) use of bathrooms; and (d) medical visits. I recommend that the motion be DENIED as to the remaining claims set forth in the parties' submissions in connection with the motion.

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[12] In addition, a basic requirement for a "collective action" under 29 U.S.C. § 216(b), such as this action, *see* Order for Notice Under 29 U.S.C. § 216(b) (Docket No. 14), which allows one or more employees to bring an action "for and in behalf of himself or themselves and other employees similarly situated," would seem to be that at least one of the employees involved, whether as a self-designated representative or as an opt-in plaintiff, have suffered the injury that is the subject of the claim.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, *et al.*	)
Plaintiffs	)
	)
v.	)
Civil No. 00371-P-C	)
	)
BARBER FOODS, INC.,	)
Defendant	)
	)

ORDER AFFIRMING THE RECOMMENDED DECISION OF THE MAGISTRATE JUDGE ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The United States Magistrate Judge having filed with the Court on January 11, 2002, with copies to counsel, his Recommended Decision on Defendant's Motion for Summary Judgment (Docket No. 41); and Defendant having filed its objection thereto on February 4, 2002, (Docket No. 44), to which objection Plaintiffs filed their response on February 14, 2002 (Docket No. 47); and Plaintiffs having filed their objection to the Magistrate Judge's Recommended Decision on February 4, 2002 (Docket No. 45), to which objection Defendant filed its response on February 14, 2002 (Docket No. 46); and this Court having reviewed and considered the Magistrate Judge's Recommended Decision, together with the entire record; and this Court having made a *de novo* determination of all matters adjudicated by the Magistrate Judge's Recommended Decision, and concurring with the recommendations of the United States Magistrate Judge for the reasons set forth in his Recommended Decision, it is **ORDERED** as follows:

(1) Plaintiffs' objection is hereby **DENIED**;

(2) Defendants' objection is hereby **DENIED**;

(3) The Recommended Decision of the Magistrate Judge is hereby **AFFIRMED**;

(4) Defendant's Motion for Summary Judgment is hereby **GRANTED** as to the following claims:

(i) all claims asserted by Plaintiffs Mohammed Habibzai, Toan Dang, Mark Aitkenhead, Shaun Albair, William Devine, Diane Keraghan, Lee LaCroix, Gordon Lemire, Gladstone Lewis, and Kyra Pardue; and

(ii) all claims asserted by the remaining Defendants based on (a) time spent walking from the plant entrances to an employee's work station, locker, time clock, or site where clothing or equipment is to be obtained; (b) time spent waiting to punch in or out or for clothing or equipment to be dispensed; (c) use of bathrooms; and (d) medical visits.

(5) The motion is hereby **DENIED** as to the remaining claims set forth in the parties' submissions in connection with the motion.

GENE CARTER
District Judge

Dated at Portland, Maind this 20th day of February, 2002.

RELEVANT STATUTORY PROVISION

29 U.S.C. 254(a) provides as follows:

§ 254. Relief from liability and punishment under the Fair Labor Standards Act of 1938, the Walsh-Healey Act, and the Bacon-Davis Act for failure to pay minimum wage or overtime compensation

(a) Activities not compensable. Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act [enacted May 14, 1947]—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or ac tivities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or sub sequent to the time on any particular workday at which he ceases, such principal activity or activities. For purposes of this subsection, the use of an em ployer's vehicle for travel by an employee and active ties performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or

estalishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

(2)

No. 04-66

Supreme Court, U.S.
FILED
JAN 3 - 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ABDELA TUM, *et al.*,

Petitioners,

v.

BARBER FOODS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Respondent, Barber Foods, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

1. This is a collective action pursuant to the provisions of section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), brought by a group of current and former employees of Barber Foods seeking compensation for alleged unrecorded and uncompensated work performed by them for the company. Partial summary judgment was granted in favor of Barber Foods, Pet. App. 20a-50a, and judgment was entered in favor of Barber Foods on the remaining claims after a jury trial. Plaintiffs appealed the judgment to the Court of Appeals for the First Circuit which, after rehearing, affirmed the judgment in all respects. *Tum v. Barber Foods, Inc.*, 360 F.3d 274 (1st Cir. 2004); Pet. App. 1a-19a.

Plaintiffs petitioned this Court for a writ of certiorari. Barber Foods did not respond to the petition, but did file a conditional cross-petition presenting a closely-related issue. *Barber Foods, Inc., dba Barber Foods v. Abdela Tum, et al.*, No. 04-231. This brief is now submitted in response to the order of the Court requesting Barber Foods to respond to the petition.

2. Barber Foods is a further processor of poultry-based products. It has no slaughtering, butchering, or deboning operations. It purchases boneless chicken breast in bulk and processes that raw material into finished products such as stuffed entrees, chicken fingers, and nuggets. The petitioners fall within four general job classifications: rotating associates who staff the production lines, set-up operators who tend the various machines on the line, meatroom associates who work where the raw product is blended with ingredients, and shipping and receiving associates. All associates are required to wear a lab coat, hairnet, earplugs, and safety glasses while

on the production floor. There are other items of clothing or equipment worn by some associates for comfort, sanitary, or safety reasons. Depending upon job classification, assignment, and personal preference, some combination of the following may be worn: vinyl gloves, cotton glove liners, vinyl aprons, sleeve covers, bump hats, back belts, and safety boots.

Rotating associates are required to wear lab coats, hairnets, earplugs, and safety glasses. The lab coat, hairnet, and earplugs must be on before they can punch in and until they punch out. Safety glasses and any items that they choose but are not required to wear, such as gloves, aprons, and sleeve covers, can be donned after punching in and before punching out. Set-up operators must wear lab coats, hairnets, earplugs, safety glasses, safety boots, bump hats, and back belts. Any other items they choose to wear may be donned after punching in. Meatroom associates are required to wear lab coats, hairnets, earplugs, safety glasses, safety boots, back-belts, aprons and vinyl gloves. Many also choose to wear sleeve covers. The apron, gloves and sleeve covers can be donned after punching in and before punching out. Shipping and receiving associates are required to wear safety boots, hard hats and back-belts. They generally don these items before punching in and doff them after punching out. Their time clock is located on the production floor, so they must don and doff a lab coat, hairnet, and earplugs briefly to enter the production floor to punch in and out.

Lab coats and cotton glove liners are obtained by associates in the hallway between the entranceway and the equipment cage. The lab coats are on hangar racks and the glove liners are in tubs. Hairnets, earplugs, vinyl gloves, sleeve covers, and aprons are dispensed from the window of

the equipment cage. Vinyl gloves, sleeve covers, and aprons are also available from tubs on the production floor. Bump hats, back belts, safety glasses, safety boots, and reusable earplugs are dispensed once and then replaced as needed.

Lab coats and cotton glove liners are laundered and reused. Laundry bins are located along the hallway from the production floor exits to the plant exits and associates drop the coats and liners in these bins on their way out of the plant . Vinyl gloves, sleeve covers and aprons are disposable. Trash bins are located on the production floor and along the hallways from the production floor exits to the plant exits. These items may be removed and deposited in the trash bins on the production floor before punching out if the associate chooses. Bump hats, back belts, safety glasses, safety boots, and reusable earplugs are retained by associates and may be stored in their locker or taken home.

Associates are expected to be on the production floor ready to work when their shift begins. They are paid from the time they actually punch in to a computerized time-keeping system. Each associate has a swipe card. Time clocks are located at the entrances to the production floor. Rotating associates, set-up operators, and meatroom associates punch in at a clock in the area where they will be working and punch out on clocks which are located next to the two primary exits from the production floor. Shipping and receiving associates punch in and out on the plant office clock located on the production floor by the shipping and receiving office. Associates are paid from the moment they punch in. They are allowed twelve minutes of "swing time", meaning that they can punch in up to six minutes early and get paid from that time or up to six minutes late without incurring an attendance violation.

There is a great deal of flexibility and personal discretion among associates in when and where they don and doff their clothing and gear. Pre-shift, some associates arrive early, pick up their clothes, and then go to the cafeteria to socialize; some don their clothes before going to the cafeteria, some after; some go to the lockers and don their clothes there, others do not use lockers; some don their clothes as soon as they retrieve them, others don them right before entering the production floor, and others don them along the way. The only requirement is that they be on the line ready to go when the shift starts. Post-shift, associates doff their clothes at various points enroute to the exits. Some items may be thrown in the trash on the production floor before punching out. After punching out there are trash receptacles and laundry bins all along the hallway from the production floor exit to the plant exit. Some associates drop their items in the first available bin off the production floor while others use the last one before the plant exit.

3. Petitioners brought this collective action contending that they were entitled to compensation for the following activities: (1) donning and doffing of all clothing and equipment required by Barber Foods or government regulation as well as any optional gear "necessitated by working conditions"; (2) time spent walking to and from their work stations on the production floor after donning and before doffing such gear; and (3) time spent waiting to obtain any clothing and equipment from the equipment cage or other distribution station and time spent waiting to punch in at the time clocks after donning such clothing and equipment.

Barber Foods moved for summary judgment in its favor on all claims. In a recommended decision affirmed by the district court, the magistrate judge made two rulings central

to the present dispute. With respect to donning and doffing, the court concluded that "the donning and doffing of clothing and equipment required by the defendant or by government regulation, as opposed to clothing and equipment which employees choose to wear or use at their option, is an integral part of the plaintiffs' work for the defendant" and thus "are not excluded from compensation under the Portal-to-Portal Act as preliminary or postliminary activities." *Tum v. Barber Foods Inc.*, 2002 WL 89399, at *9, 10 (D. Me. 2002); Pet App. 36a-37a, 40a. With respect to walking and waiting time, the court ruled that Barber Foods

> is entitled to summary judgment on any claims based on time spent walking from the plant entrances to an employee's workstation, locker, time clock or site where clothing and equipment required to be worn on the job is to be obtained and any claims based on time spent waiting to punch in or out or for such clothing or equipment.

Id. at *8; Pet. App. 33a-34a.

A trial was held on the amount of time reasonably spent engaged in donning and doffing the required clothing and equipment in the relevant job categories and whether that time was *de minimis*. The jury found that the combined donning and doffing times ranged from one minute for rotating associates to two minutes sixteen seconds for set-up operators and determined that this time was *de minimis*. Petitioners appealed.

The First Circuit affirmed. 331 F.3d 1 (1st Cir. 2003). A petition for rehearing was granted, the original judgment was vacated, and a new opinion issued, again affirming the

district court in all respects. *Tum v. Barber Foods, Inc.*, 360 F.3d 274 (1st Cir. 2004); Pet. App. 1a-19a. The court of appeals agreed that the donning and doffing of required gear is an integral and indispensable part of the employees' principal activities and, in the absence of the jury's *de minimis* finding, would have been compensable , *Id.* at 279, Pet. App. 7a, but concluded that all of the other activities at issue in the case, including the donning and doffing of non-required gear, time spent waiting to obtain required clothing and gear and to punch in at time clocks after donning such gear, and time spent walking to and from the employees' work stations after donning and before doffing required gear, were preliminary and postliminary activities exempted from compensation by the Portal-to-Portal Act. *Id.* at 280-82; Pet App. 8a-12a.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

1. The first question presented by the petition is whether the time employees spend walking to and from stations where required clothing and equipment is distributed is compensable. Petitioners argue that the Court's intervention is necessary to resolve a conflict among the circuits on this issue. Although a conflict does exist at this time between the First and Tenth Circuits on the one hand and the Ninth Circuit on the other, Barber Foods submits that the First Circuit's decision on this issue was correct and, as the case law develops, its views are likely to become the clear majority rule, a situation which ordinarily would not warrant this Court's attention.

2. The second question presented by the petition is whether time employees spend waiting at stations where required clothing and equipment is distributed, and time spent donning and doffing optional equipment "necessitated by the employees' working conditions," is compensable. The First Circuit decided both questions in the negative. Its decision was correct. There is no conflict among the circuits regarding the noncompensability of donning and doffing optional clothing and gear, and the court's decision on the waiting time issue is likely to become the clear majority rule. Neither issue merits this Court's review.

3. The third question presented by the petition is whether walking and waiting time is rendered noncompensable because the associated donning and doffing time was determined to be *de minimis*. This issue was not addressed by the court of appeals and played no part in its decision. The Court should decline to grant certiorari on an issue that was not addressed in the court of appeals.

ARGUMENT

I. Scope And Coverage Of The Portal Act

The FLSA requires an employer to compensate employees for all of the time which the employer requires or permits employees to work. 29 U.S.C. § 201 *et seq.* Compensable "work" under the Act has been defined as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)

this Court, applying the *Tennessee Coal* definition of "work", held that employees were entitled to compensation for certain "preliminary" activities performed after arriving at the workplace but before beginning their principal work activities, including "putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger cots, preparing the equipment for production work, turning on switches for lights and machinery, opening windows, and assembling and sharpening tools." *Id.* at 692-93. The Portal Act was enacted in response to the *Mt. Clemens* decision. Under the Portal Act, employers are not obligated to compensate employees for "walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" or for "activities which are preliminary or postliminary to said principal activity or activities" where such traveling or activities "occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. § 254(a). However, activities performed either before or after the regular work shift are compensable "if those activities are an integral and indispensable part of the [employees'] principal activities . . . and are not specifically excluded by Section 4(a)(1)." *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956).

II. The Court Of Appeals Correctly Determined That The Time Employees Spend Walking To And From The Production Floor After Donning Required Clothing And Equipment And Before Doffing That Gear Is Noncompensable Preliminary And Postliminary Activity Under The Portal Act.

1. The Petitioners contend that the court of appeals erred in holding that the time employees spend walking to and from the production floor after donning and before doffing required clothing and equipment is noncompensable preliminary and postliminary activity under the Portal Act. They argue that this walking time is compensable for two basic reasons. First, it occurs during the "workday" which, according to the Petitioners, runs continuously between the first and last compensable activities of the day and thus is not subject to the limitations of the Portal Act. Second, the walking time is in any event integral and indispensable to the employees' principal job activities. Pet. 14.

2. The Petitioners' "workday" argument is as follows: The Portal Act exempts from compensable work only those preliminary and postliminary activities "which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. § 254(a). Any walking time which occurs after the commencement of the employees' first principal activity is compensable work because it is part of the "workday" and not exempted from compensation by section 4(a). 29 C.F.R. § 790.6(a), (b). Principal activities include all activities which are integral and indispensable to those activities. *Id.* § 790.8(b), (c). The court of appeals held that the donning and doffing of required clothing and equipment is an integral part of

the employees' principal activities. Pet. App. 7a. Therefore, Petitioners argue, walking to and from their work stations after donning and before doffing is compensable because it occurs between the commencement and completion of the principal activities of donning and doffing required gear.

There is some support in the interpretive regulations for the Petitioners' expansive view of the parameters of the "workday." *See* 29 C.F.R. §§ 790.6(a), (b), 790.8(b), (c). Petitioners argue that this Court should defer to the Secretary of Labor's views as expressed in these regulations. However, as the court of appeals pointed out, Pet. App. 10a, those regulations cut both ways. The regulations clearly contemplate that walking by an employee between the plant entrance and the employee's workstation, where he actually performs the work he was hired to do, would normally be considered noncompensable preliminary and postliminary activity. 29 C.F.R. § 790.7(e), (f)(1). Petitioners argue that this is not so where donning and doffing is considered an integral part of the employees' principal activities, but the regulations also clearly contemplate that walking to and from "the actual place of performance of the specific work the employee is employed to perform" may be considered preliminary and postliminary activity even if it occurs between compensable donning and doffing, *id.* § 790.7(g) n.49, or even if the employee is carrying "ordinary hand tools" required for the job. *Id.* § 790.7(d). The regulations relied upon by Petitioners refer in general terms to "principal" activities and "integral" and "indispensable" activities. Those cited by Barber Foods deal specifically with the issue of walking time. On balance, the interpretive regulations favor the conclusion that walking to and from the plant entrance to the employees' work stations where they perform the specific work they were hired to perform is noncompensable preliminary and postliminary activity even if it occurs between compensable donning and doffing.

This position makes sense and avoids absurd results. Normally, walking from the plant entrance to the actual work station is noncompensable. *Id.* § 790.7(e), (f)(1). That path must be traversed in any event. It is difficult to discern why that noncompensable walk should become compensable simply because the employee has first donned some required clothing or equipment. According to the Petitioners, the first and last compensable activities, even if *de minimis*, form the boundaries of the "workday" within which the Portal Act does not apply. Under this view, an employee who is required to wear only a hardhat and who dons that hardhat at the plant entrance must be paid for his walk to his workstation while another employee who works right beside him but is not required to wear a hardhat need not be paid for that same walk. Post-shift, Barber Foods' employees doff their clothing and equipment at various points enroute from the production floor to the plant exit. Some items can be thrown in the trash can in the production area before punching out. After punching out, there are laundry bins and trash receptacles all along the hallway from the production floor exit to the plant exit. Some employees drop their items in the first bin right outside the production floor while others use the last bin before the plant exit. Under the Petitioners' reading of the regulations, the employee who doffs her equipment and drops it in the first bin ends her compensable workday at that point while the employee who walks by her and drops her clothes in the last bin gets paid for the walk. Such distinctions make no sense and, as the First Circuit recognized, the position advanced by the Petitioners "threatens to undermine Congress's purpose in the Portal-to-Portal Act, which (with rare exceptions) sought to exclude preliminary and postliminary waiting and walking time from compensability." Pet. App. 10a.

3. Petitioners also claim that the walking time "is in any event compensable because it, like the time spent donning and doffing required equipment, is integral and indispensable to the

employees' principal job activities." Pet. 14. The standard applied by the Petitioners in arriving at this conclusion, that to be "integral and indispensable" an activity must be necessary to the principal work performed and done for the benefit of the employer, Pet. 20, conflates the test for determining whether an activity is an integral and indispensable part of the employees' principal activities with the test for determining whether an activity constitutes "work" and renders the Portal Act superfluous. The court of appeals correctly rejected Petitioners' argument in this regard.

The concepts of "work" and noncompensable preliminary or postliminary activities are not mutually exclusive. In other words, the fact that an activity may constitute "work" under the *Tennessee Coal* definition does not mean that the activity must either be a principal activity or integral to a principal activity. Even if an activity constitutes "work" it may still be a noncompensable preliminary or postliminary activity because the very purpose of section 4(a) of the Act was to relieve employers from the obligation to compensate employees for certain preliminary and postliminary activities that would otherwise be compensable and the only reason they would otherwise be compensable is if they constituted "work." *See* 29 C.F.R. § 790.4(a)(1):

> The primary Congressional objectives in enacting section 4 [were] to minimize uncertainty as to the liabilities of employers which it was felt might arise in the future if the compensability under the [FLSA] of such preliminary or postliminary activities should continue to be tested solely by existing criteria for determining compensable worktime.

Id. § 790.2(a) (The Act "contemplates that employers will be relieved, in certain circumstances, from liabilities . . . to

which they might otherwise be subject under the [FLSA]"); *Id.* § 790.4(a) (Section 4 "relieves the employer from certain liabilities . . . to which he might otherwise be subject under the provisions of the [FLSA])." Thus, even if the walking time can be considered "work", it may still be preliminary and postliminary activity.

It follows that the fact that certain activities are necessary to the principal work performed and done for the benefit of the employer does not automatically transform those activities from noncompensable preliminary and postliminary activities to compensable integral and indispensable activities. The very nature of preliminary activities is that they are a prerequisite to the performance of the principal activities and are obviously of benefit to the employer. To say, as the Petitioners do, that any activity which is necessary to the principal work performed and done for the benefit of the employer, which is the *Tennessee Coal* definition of "work," cannot be a preliminary or postliminary activity but must necessarily be deemed an integral and indispensable part of the principal activity, is in effect to transpose the criteria for determining "work" onto the criteria for determining preliminary and postliminary activity even though the purpose of section 4 was to exclude such activity from the "existing criteria for determining compensable worktime." *Id.* § 790.4(a)(1). It would also ensure that every activity which qualifies as "work" must also be considered integral and indispensable to the principal activity, leaving the preliminary/postliminary category to cover only those activities which do not qualify as "work." Congress did not need to enact the Portal Act to accomplish that result, because if the activity was not "work" it was not compensable under the FLSA in any event. The Petitioners' argument, which would render the Portal Act superfluous, should be rejected.

III. The Court Of Appeals Correctly Determined That The Time Employees Spend Waiting At Stations Where Required Clothing And Equipment Is Distributed, And Time Spent Donning And Doffing Optional Equipment, Is Noncompensable Preliminary And Postliminary Activity Under The Portal Act.

A. Waiting Time

The court of appeals concluded that "a short amount of time spent waiting in line for gear is the type of activity that the Portal-to-Portal Act excludes from compensation as preliminary." Pet App. 12a. This holding was correct. The interpretive regulations clearly contemplate that a reasonable amount of waiting time was intended to be noncompensable preliminary activity. Examples include "checking in and out and waiting in line to do so" and "waiting in line to receive pay checks." 29 C.F.R. § 790.7(g). One regulation specifically states that "checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities." *Id.* § 790.8(c).

There is no logical analytical distinction between waiting in line to check in and punch a time clock and waiting in line to obtain required clothing and equipment. Both are necessary before performing the principal work activity and are done for the benefit of the employer. In Petitioners' view, this is enough to make them both integral and indispensable to the principal activity. Yet, the regulations provide that waiting in line to check in should normally be considered preliminary activity. Consistent with the intent of the interpretive regulations and the underlying purposes of the Portal Act, there is no reason to treat waiting in line to obtain required clothing and equipment any differently.

Except for the smallest of employers, it is impossible for all employees to arrive at the place of employment, punch a time clock, and be at their workstations ready to work at exactly the same time, without varying degrees of waiting time. Depending upon when they arrive at the plant, some may have to wait at the time clock and others may not. The situation is similar in this case with regard to obtaining required clothing and equipment. Some employees arrive early, pick up their clothes, and then go to the cafeteria to socialize; some don their clothes before going to the cafeteria, some after; some go to the lockers and don their clothes there, others do not use lockers; some don their clothes as soon as they retrieve them, others done them right before entering the production floor, and others don them along the way. Some arrive at the plant early and some arrive at the last possible minute. The only requirement is that they be on the line ready to go when the shift starts, and even as to that requirement they are allowed up to twelve minutes of "swing time", meaning they can punch in up to six minutes early and get paid for that time or up to six minutes late without incurring an attendance violation. Depending on when they arrive at the plant, some may have to wait in line to obtain their gear while others do not have to wait at all. As this Court stated in *Mt. Clemens*, in rejecting a claim for time spent waiting in line to punch a time clock, "[it] would be manifestly unfair to credit the first person with . . . more working time than credited to the last person due to the fortuitous circumstance of his position in line." 328 U.S. 680, 690. That is why a reasonable amount of pre-shift waiting time is considered noncompensable preliminary activity.

B. Donning and doffing of optional clothing and equipment

The court of appeals held that the donning and doffing of required gear is an integral and indispensable part of the employees' principal activities and therefore compensable. Pet. App. 7a. That ruling, with which Barber Foods disagrees, is the subject of its conditional cross-petition. The court also held that the donning and doffing of optional clothing and equipment is noncompensable preliminary and postliminary activity. Pet. App. 8a. This ruling was clearly correct and there is no conflict among the circuits on the topic which would warrant this Court's review.

The noncompensability of clothes changing is the rule, not the exception. *Steiner v. Mitchell*, 350 U.S. 247, 249 (1956); 29 C.F.R. § 790.7(g) ("Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered 'preliminary' or 'postliminary' activities, include . . . changing clothes . . ."). "Changing clothes" encompasses the donning and doffing of sanitary and protective clothing and equipment. *See*, June 6, 2002 Opinion Letter, Department of Labor Wage and Hour Division, 2002 WL 32406592.

With the exception of the First Circuit in this case, every other court of appeals which has addressed the issue has held that the donning and doffing of *required* clothing the same or similar to that involved in this case is noncompensable. *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994) (smocks, hairnets, earplugs, safety glasses, hard hats, safety boots); *Alvarez v. IBP, Inc.* 339 F.3d 894 (9th Cir. 2003) (frocks, hairnets, earplugs, safety glasses, hard hats, safety boots); *Anderson v. Pilgrim's Pride Corp.*, 44 Fed. Appx. 652 (5th Cir. 2002), *aff'g*, 147 F. Supp. 2d 556 (E.D. Tex. 2001)

(smocks, hairnets, earplugs, safety glasses, gloves, boots, sleeve covers). None of these courts have held, nor, given the reasoning behind their decisions, would hold that the donning and doffing of *optional* clothing is compensable.

The Petitioners assert that the court of appeals' ruling that the donning and doffing of optional equipment is noncompensable "flatly contradicts" *Steiner*, Pet. 10, which Petitioners contend "stands for the proposition that time spent donning and doffing safety equipment is compensable if it is integral and indispensable to the employees' jobs, a determination that does not turn on whether it is a formal job requirement." Pet. 23. Although this characterization of the *Steiner* holding is correct as far as it goes, it fails to recognize the limited scope of the *Steiner* decision. As noted earlier, the noncompensability of clothes changing is the rule, not the exception. 29 C.F.R. § 790.7(g). In *Steiner*, this Court recognized a limited and narrow exception to the general rule. Emphasizing that "changing clothes . . . under normal conditions . . . ordinarily constitutes 'preliminary' or 'postliminary' activities excluded from compensable work time as contemplated in the Act," 350 U.S. at 249, the Court held that where employees were exposed to and made "extensive use of dangerously caustic and toxic materials, and [were] compelled by circumstances, including vital considerations of health and hygiene, to change clothes and to shower in facilities which state law require[d] their employer to provide," such clothes changing was an integral and indispensable part of the employees' compensable principal activities. *Id.* at 248, 256. Thus, *Steiner* recognized that, despite the general rule of noncompensability, clothes changing may be regarded as an integral and indispensable part of employees' principal activities if it involves special protective gear that is uniquely and closely related to dangers

inherent in a particular job and is compelled by vital considerations of health and hygiene. That is not the situation with respect to the optional clothing and gear at issue in this case.

The Petitioners argue that the scope of the *Steiner* decision is not so limited and that any activity, including donning and doffing, is integral and indispensable if it is necessary to the principal work performed and done for the benefit of the employer. As discussed earlier, this is not the correct standard because it conflates the test for determining whether an activity is an integral and indispensable part of the employees' principal activities with the test for determining whether an activity constitutes "work" even though an express purpose of the Portal Act was to exempt as preliminary and postliminary some activities that previously would have been considered to be compensable work. Even if it was the correct standard, it is not met by the optional clothing and equipment involved in this case. The items in question are neither required nor necessary in order to perform the employees' principal job activities. They are worn as a matter of discretion for personal comfort and convenience. The fact that many employees choose not to wear these optional items demonstrates that they are not necessary. To be sure, most anything that contributes to the comfort and convenience of employees is of at least indirect benefit to the employer, but the primary benefit is for the employee. Barber Foods submits that the donning and doffing of these optional items would not qualify as work even under the *Tennessee Coal* definition. It certainly does not qualify as integral and indispensable to the principal job activities under the Portal Act, which was intended to impose limitations on the scope of compensable work in this area.

Petitioners' reading of *Steiner* to encompass the donning and doffing of the optional items at issue in this case would extend the limited exception recognized by that case far beyond its intended scope. It would turn the noncompensability of clothes changing into the rare exception, rather than the general rule.

IV. The Issue Of Whether Walking And Waiting Time Is Rendered Noncompensable Because The Associated Donning And Doffing Time Was Determined To Be *De Minimis* Was Not Addressed By The Court Of Appeals And Played No Part In Its Decision.

The third question presented by the petition is whether walking and waiting time is rendered noncompensable because the associated donning and doffing time was determined to be *de minimis*. This issue was not addressed by the court of appeals and played no part in its decision that the walking and waiting time in this case is noncompensable preliminary and postliminary activity. The Court should decline to grant certiorari on an issue that was not even addressed by the court of appeals.

The jury's determination that the time spent donning and doffing required clothing and equipment was *de minimis* was not a factor in the court of appeals' decision. The court first ruled that the donning and doffing of required gear is compensable because it is an integral and indispensable part of the employees' principal activities. Pet. App. 7a. Then, assuming that the donning and doffing is compensable and without once mentioning the *de minimis* finding, the court held that the walking and waiting time associated with that activity is, nevertheless, noncompensable preliminary and postliminary activity. Pet. App. 8a-12a. The question urged

by Petitioners would be presented if the court had ruled that the walking and waiting time associated with required donning and doffing would ordinarily be compensable but, given the jury's *de minimis* finding, it cannot be so in this case. However, that was not the basis of the court of appeals' ruling. Instead, the court assumed that the donning and doffing activity was compensable and held that the associated walking and waiting time was noncompensable anyway. The *de minimis* finding simply played no role in its decision.

Petitioners assert that this case presents the opportunity for the Court "to resolve an important circuit split regarding the application of the *de minimis* rule," Pet. 10, and to "provide guidance to the courts of appeals as to how the period of time that is the subject of the *de minimis* inquiry should be defined . . . ," Pet. 9, and the petition discusses this issue extensively. Pet. 7-10, 12-13, 17-18. This is an interesting issue. However, it is not an issue that was decided, or even discussed, by the court of appeals and it is not one of the three questions that Petitioners identified as being presented by the petition. The Court should decline to provide an advisory opinion on the issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 04-66

IN THE

Supreme Court of the United States

Abdela Tum,

Petitioner,

v.

Barber Foods, Inc.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

PETITIONERS' REPLY BRIEF

Timothy Fleming
Lori Kisch
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REPLY BRIEF FOR THE PETITIONERS

Respondents do not dispute that the circuits are divided on the principal issues raised by the petition for certiorari: whether *walking* and *waiting* time associated with safety equipment distribution is compensable work under the Fair Labor Standards Act. *See* Pet. 5-7. Nor do they contest that these issues are sufficiently important to merit this Court's resolution: the circuit split creates unacceptable financial uncertainty for employers and employees across the country, and often causes employees of the *same company* in the same job category, but in different locations, to receive different compensation. *See* Pet. 11-12. Nor, finally, do they disagree that this case, particularly if reviewed together with No. 03-1238, *IBP, Inc. v. Alvarez*, is the best available vehicle for this Court's resolution of these questions. *See* Pet. 12-13. Instead, respondents simply argue that the court below was so obviously correct on the merits that other courts of appeals will no doubt be convinced and the circuit split will resolve itself. That expectation is unrealistic and does not constitute a serious argument against certiorari.

In any event, respondents' view of the merits is wrong. The Labor Department's "continuous workday" rule is supported by the text and history of the FLSA and Portal-to-Portal Act. And respondents offer no justification for the court of appeals' refusal to defer to the Labor Department's interpretation, other than an assertion that the regulations are themselves ambiguous. But that argument is not only based on an insupportable reading of the regulations; it also ignores the Department's own interpretation of the regulations. Moreover, even apart from the "continuous workday" rule, walking and waiting for safety equipment are compensable because they are necessary to enable employees to perform the duties for which they are hired.

As to two other issues raised by the petition, respondents do challenge the basis for this Court's review, but their contentions are meritless. First, respondents claim that there

is no circuit split on the important question whether time spent donning and doffing equipment required by the nature of an employee's job, but not formally required by an employer or by law, is compensable. But they do not dispute that the court of appeals' view that such time was not compensable was expressly rejected by the Sixth Circuit in *Steiner v. Mitchell*, 215 F.2d 171, 174-75 (1954), and also contradicts this Court's decision affirming the Sixth Circuit in that case, 350 U.S. 247 (1956). Second, respondents observe that the court of appeals did not reach the final question: whether a characterization of the otherwise compensable donning and doffing time as "*de minimis*," when taken alone, means that walking and waiting time associated with that donning and doffing is noncompensable. However, if this Court were to reverse the court of appeals' holdings, it *would* have the opportunity to reach that issue and resolve the considerable confusion that has plagued the lower courts' application of the "*de minimis*" rule.

I. The Circuit Conflict Concerning Walking And Waiting Time Is Unlikely To Be Resolved By Further Percolation, And Merits This Court's Review Now.

Respondents do not dispute that the court of appeals' decision on the question of walking and waiting time squarely conflicts with that of other circuits in two respects. First, the court of appeals held that time spent walking to and from safety equipment distribution stations was not compensable under the Portal-to-Portal Act, 29 U.S.C. 254(a)(2), because it was merely "preliminary or postliminary." Pet. App. 8a-10a. Second, the court of appeals held that time spent *waiting* at those stations was not compensable for the same reason. Pet. App. 11a. Both these holdings squarely conflict with those of the Ninth Circuit in *Alvarez v. IBP, Inc.*, 339 F.3d 894 (2003). *See id.* at 906-07 (walking time); *id.* at 903, 904 (waiting time). The Tenth Circuit took a third approach in *Reich v. IBP, Inc.*, 38 F.3d 1123 (1994), holding some waiting time compensable but deeming other waiting and walking time

noncompensable because it was not continuous with employees' other work activities. And the Fifth and Eleventh Circuits have likewise reached waiting time holdings that conflict with that of the court of appeals. See Pet. 7 (citing *Mireles v. Frio Foods*, 899 F.2d 1407, 1411 (CA5 1990); *Cole v. Farm Fresh Poultry*, 824 F.2d 923, 929 & n.6 (CA11 1987)).

There is no reason to expect that further percolation in the courts of appeals will resolve this broad conflict. Respondents' position that the purported correctness of the First Circuit's analysis will soon persuade all *four* of the circuits that have adopted at least partially contrary views would be unrealistic even if respondents were right on the merits. The First Circuit, meanwhile, seems unlikely to change *its* position, having just reaffirmed it after rehearing the case following the *Alvarez* decision. Nor will waiting for other circuits to weigh in help; as is demonstrated by the scattershot approaches of those circuits that have already decided the interrelated questions presented by the petition, additional appellate rulings are likely simply to compound and further entrench the confusion.

Furthermore, the First Circuit was wrong on the merits of both questions. First, walking and waiting time are both compensable if they fall within the "continuous workday" that runs between the first and last compensable activities of the day (for instance, the donning and doffing that the First Circuit itself deemed compensable). See Pet. 14-18. The "continuous workday" rule is the considered position of the Department of Labor, embodied in interpretive regulations, and merits deference. *Id.* at 24-28. Respondents maintain that the regulations "cut both ways," and that, specifically, the regulation stating that the walk between the plant entrance and the employee's workstation is noncompensable undercuts the Labor Department's view regarding the compensability of other walking time. BIO at 10. But the fact that the Department's regulations unsurprisingly exclude the *specific period of walking time* that is *expressly deemed*

noncompensable by the Portal-to-Portal Act, see 29 U.S.C. 254(a)(1), does not contradict the Department's position that *other* periods of walking time occurring within the bounds of the "workday" *are* compensable. The statute leaves the latter question open, and the Department has offered a reasonable interpretation, one that *precisely tracks* this Court's own interpretation, *see Steiner*, 350 U.S. at 256 (holding that, in addition to activities not satisfying the "integral and indispensable" test, those activities "specifically excluded by Section 4(a)(1)" are not compensable work), and that recognizes that Congress is unlikely to have intended the administrative inconvenience of repeatedly stopping and restarting the "workday" clock. More to the point, as respondents do not dispute, the court of appeals' attempt to resolve an imagined conflict within the regulations directly contradicts the Department's *own* interpretation of its own regulations – an interpretation to which the court of appeals inexplicably gave no deference whatsoever. *See* Pet. 27-28.

Even setting aside the "continuous workday" rule, petitioners' donning and doffing activities clearly satisfy the "integral and indispensable" requirement established by this Court in *Steiner*: they are essential to enable petitioners to do the jobs they are hired to do. Respondent's sole response to this point is that it "conflates the test for determining whether an activity is an integral and indispensable part of the employees' principal activities with the test for determining whether an activity constitutes 'work.'" BIO 12. That is false; it is *respondents* who are guilty of that conflation. Contrary to respondents' implication, this Court's decision in *Tennessee Coal, Iron, & Railroad Co. v. Muscoda* did not define "work" to mean activities "necessary to the principal work performed and done for the benefit of the employer," BIO 12. Instead, it defined it as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." 321 U.S. 590, 598 (1944). It was *Steiner*, interpreting the intervening Portal-to-

Portal Act, that added the requirement that, in order to be "*compensable* work," an activity had to be not only performed for the employer's benefit, but also "an integral and indispensable part of the *principal* activities for which covered workmen are employed." 350 U.S. at 256 (emphasis added).[1] If petitioners' walking and waiting time satisfies that standard – and respondent does not deny that it does – it indisputably satisfies the Portal-to-Portal Act. Respondent's assertion that "the fact that certain activities are necessary to the principal work performed and done for the benefit of the employer does not automatically transform those activities . . .

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[1] Petitioners' argument therefore does not "render the Portal Act superfluous." BIO 13. The Portal-to-Portal Act limited the preexisting standards set by *Tennessee Coal* and *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 691 (1946), in two ways: it expressly excluded from compensation, in § 254(a)(1), travel time "to and from the actual place of performance of the principal activity"; and it excluded work that was done for the *benefit* of the employer, and controlled or required by the employer, but was not integral and indispensable to the employee's *primary* job activities. This latter distinction is a meaningful one. For instance, the Act excludes time spent punching in on a time clock, see 29 C.F.R. 790.7(g) – an activity required by the employer, which serves the employer's administrative needs, but which has nothing to do with actually enabling the employee to perform the primary job task (*e.g.*, meatpacking) that he is hired to do. Time spent donning and doffing safety equipment that is necessitated by the nature of the job, in contrast, is essential to enable the employee to perform that primary task, as this Court recognized in *Steiner*. And time employees spend walking and waiting to obtain that equipment is thus also integral and indispensable to their primary job duties.

Respondent misleadingly states that *Mt. Clemens* "reject[ed] a claim spent waiting in line to punch a time clock," BIO 15, implying that such claims were invalid even before the Portal-to-Portal Act. In fact, the Court expressly stated that that issue was not presented, see 328 U.S. at 691, and, if anything, its rationale – *inter alia*, that it would be unfair to credit two employees arriving at work simultaneously with different amounts of working time simply because one got through the line, and to the work floor, faster – implies that waiting time *should* be compensable work. *Id.* at 689-90.

to compensable integral and indispensable activities," BIO 13, ignores *Steiner*'s express holding.

II. The Court Of Appeals' Holding That Time Spent Donning And Doffing Safety Equipment Functionally Required By The Nature Of The Job Is Noncompensable Conflicts With The Holdings Of Other Courts Of Appeals And Of This Court.

The court of appeals erroneously held that the time petitioners spent donning and doffing equipment that is critical to enable them to perform their jobs safely is noncompensable because the employer imposed no formal requirement that petitioners use the equipment. Respondents, who misleadingly characterize this equipment as "optional," do not contest that this case provides an ideal vehicle to consider this question, which – like the waiting time and "*de minimis*" issues – is not presented by the *Alvarez* petition. See Pet. 12-13.

Instead, respondents assert that there is no circuit conflict on this question, but they do not even mention the Sixth Circuit's holding in *Steiner*, 215 F.2d 171. In that decision, the Sixth Circuit squarely rejected exactly the distinction for which respondents now argue – that between formally required equipment and functionally required equipment. *Steiner* was affirmed by this Court, and the court of appeals' decision remains good law in the circuit.

Moreover, especially taken in the context of the Sixth Circuit's direct holding on the issue, this Court's *Steiner* opinion cannot be taken as anything other than a rejection of the position taken by the court of appeals here. *Steiner* held that "*all* activities which are 'an integral and indispensable part of the principal activities'" are compensable, 350 U.S. at 253, not just those formally required by the employer. Furthermore, the rule respondents propose would have led to a different result on the facts of *Steiner* itself. See Pet. 22-23.

Respondent attempts to evade this conclusion by falsely claiming that this equipment is "worn as a matter of discretion

for personal comfort and convenience." BIO 18. The "optional" equipment at issue in this case (some of which was formally required for some job categories but not others) included "vinyl gloves, cotton glove liners, vinyl aprons, sleeve covers, bump hats, back belts, steel-toed boots, rain pants, steel mesh gloves, and lockout-tagout equipment." Pet. App. 23a-24a. The notion that employees wear (for instance) back belts and steel mesh gloves because they are *comfortable* is simply untenable. Rather, they wear them because they are necessary to permit them to do their jobs safely – just as the employees in *Steiner* did. Even the court of appeals acknowledged that the equipment in question "promotes safety and sanitary conditions." *Id.* 8a.

Moreover, although *Alvarez* does not directly address respondent's argument, the First Circuit's holding here also conflicts with the result in that case, in which the Ninth Circuit affirmed the district court's holding that time spent donning and doffing at least one piece of equipment not required by the employer – back belts (also called weight belts) – was compensable. See *Alvarez*, 2001 U.S. Dist. LEXIS 25344, at *36 (E.D. Wash.) (deeming "weight belts" compensable); *Alvarez*, 339 F.3d at 898 n.2 (observing that "many employees opt to wear weight-lifting-type belts to prevent back injury"). Notably, the First Circuit denied compensation for time spent donning and doffing back belts even though they were *required* for several job categories, see Pet. App. 24a, which belies respondent's unfounded assertion that donning and doffing the types of equipment at issue in this case would not have been deemed compensable by other courts. See also *Reich*, 38 F.3d at 1124-25 (holding time spent donning and doffing equipment including "polar sleeves, rubber boots," and "a weight belt" compensable when employees' job conditions made such equipment necessary).[2]

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[2] All of these three items are at issue in this case. Pet. App. 24a-25a. Moreover, neither this Court nor the Sixth Circuit in *Steiner* attached any

III. This Case Properly Presents The Issue Of Aggregation Of Time For Purposes Of The "*De Minimis*" Rule, Which Has Divided The Circuits And Merits This Court's Review.

Respondent does not contest that the issues surrounding proper application of the "*de minimis*" rule, including how individual activities are to be aggregated and whether a "*de minimis*" activity can trigger the running of the "continuous workday," have caused widespread confusion and division in the courts of appeals, nor that this conflict merits this Court's review. See Pet. 7-10. Instead, it argues only that this issue was not addressed by the court below.

Because the court below refused to apply the "continuous workday" rule, and because it deemed most of petitioners' activities noncompensable to begin with and therefore had no opportunity to aggregate them for the purposes of the *de minimis* rule, it did not need to address either of these questions. Notably, however, the court did specifically request briefing on the issue, see Order of Aug. 18, 2003 (CA1), and Judge Boudin's concurrence did identify the *de minimis* rule as an alternate ground for the court's holding. Pet. App. 18a-19a. Petitioners do not, of course, argue for certiorari *exclusively* for the purpose of resolving these questions. But if the Court grants certiorari on any of the other issues presented here, it will have an opportunity to resolve them. *See* Br. of United States in *IBP, Inc. v. Alvarez*, No. 03-1238, at 7-12 (observing that *Tum*, unlike *Alvarez*, raises a "question of considerable significance to the administration of the FLSA – whether donning and doffing time should be considered together with walking time in assessing whether the time devoted to those activities is *de minimis*").

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significance to the *kinds* of clothes plaintiffs were taking on and off, so long as their changing clothes was functionally required for job safety.

The issues surrounding the *de minimis* rule are closely intertwined with the other questions presented by this case. In order to apply the "continuous workday" rule, for instance, it will be essential for courts to understand *what* activities mark the start or stop of the workday, as Judge Boudin's concurrence makes clear. Furthermore, the district court in this case granted summary judgment to respondents on the compensability of walking, waiting, and some donning and doffing time; it sent petitioners' other donning and doffing claims to the jury, which found them, *standing alone*, to be *de minimis*. If the court was wrong to grant partial summary judgment, however, then the question is squarely presented whether *all* petitioners' claims, including those already sent to the jury, merit a new trial. For if petitioners are right about the aggregation issue, then the original jury was presented with the wrong question; it should have been asked whether *all* petitioners' donning, doffing, walking, and waiting time, taken together, was more than *de minimis*. And if even a *de minimis* activity can trigger the start of a "continuous workday," then the jury's finding is likewise irrelevant.

This Court may consider these issues in the first instance. First, as Judge Boudin's concurrence makes clear, the *de minimis* issue would (if respondents prevailed on it) constitute an alternative basis for upholding the court of appeals' judgment even if petitioners prevailed on the other issues they raise here, and this Court therefore has jurisdiction to reach the question. *See, e.g., Granfinanceria, S.A. v. Nordberg*, 492 U.S. 33, 38-40 (1989). Of course, this Court ordinarily declines review as a discretionary matter if the alternative ground is not an issue "of sufficient general importance to justify the grant of certiorari," *United States v. Nobles*, 422 U.S. 225, 241-42 n.16 (1975), but here the issue is sufficiently important, as respondents do not contest. And although this Court often properly exercises its discretion not to resolve such questions in the first instance, here several factors combine to weigh in favor of this Court's resolution: the close intertwining of the issues; the presence of a wide

and deep circuit conflict ripe for this Court's review; the fact that the issue was thoroughly briefed and argued below in response to the court's request; and that it was the subject of a lengthy discussion in a concurring opinion.

CONCLUSION

For the foregoing reasons and those explained in the petition, this Court should grant certiorari and reverse the judgment of the Court of Appeals for the First Circuit.

Respectfully submitted,

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January 21, 2005

No. 04-66

In the Supreme Court of the United States

ABDELA TUM, ET AL., PETITIONERS

v.

BARBER FOODS, INC., DBA BARBER FOODS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Is the time employees must spend walking to and from stations where required safety equipment is distributed compensable under the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, as amended by the Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*

2. Do employees have a right to compensation for time they must spend waiting at required safety equipment distribution stations.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The questions presented in this case concern the compensability under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, as amended by the Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*, of time that employees must spend walking and waiting in connection with the donning and doffing of required clothing and equipment. The United States has a substantial interest in the resolution of those questions. The Secretary of Labor is responsible for enforcing the FLSA as amended by the Portal Act. 29 U.S.C. 204, 211, 216(c), 259. Consistent with that responsibility, the Department has issued regulations that address the compensability of walking and waiting time as well as the effect of the Portal Act on those issues. See, *e.g.*, 29 C.F.R. 785.9, 785.14, 785.24, 785.34, 785.38, 790.6-790.8. The

Department of Labor filed briefs as amicus curiae in the court of appeals in this case, arguing that the walking and waiting time associated with required donning and doffing are compensable under the FLSA and not excluded from compensation by the Portal Act. The Department has also filed suits against employers seeking to require them to compensate their employees for such walking and waiting.

In addition, at the Court's invitation, the United States filed a brief at the petition stage in *IBP, Inc.* v. *Alvarez*, cert. granted, 125 S. Ct. 1292 (2005). The petition in that case raises the question whether walking time that is associated with donning and doffing is compensable under the FLSA. While the United States suggested that prudential considerations counseled against review in that case, it argued that the issue warranted review in an appropriate case, and noted that the issue was presented in this case. The Court granted certiorari in *Alvarez* on the walking time issue and consolidated that case with this one.

STATEMENT

1. The FLSA generally requires covered employers to pay their employees a minimum wage for the hours they work. 29 U.S.C. 206. The FLSA also generally requires employers to pay their employees at a rate of one and one-half times their regular rate of pay for time worked in excess of 40 hours in a workweek. 29 U.S.C. 207. In calculating hours worked for minimum wage and overtime purposes, the FLSA generally includes all time spent on "physical or mental exertion (whether burdensome or not) controlled or required by the employer, and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & R.R.* v. *Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). Because "[r]eadiness to serve may be hired, quite as much as service itself," *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944), the time an employee spends waiting is also counted as compensable work when

the employee is "engaged to wait," rather than "wait[ing] to be engaged." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 137 (1944). Compensable time thus generally includes "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-691 (1946).

Applying those general principles, the Court held that activities that are performed before and after the employee's normal shift can be compensable work. In *Tennessee Coal*, the Court held that underground travel between a mine's portal and the employee's work place within the mine is compensable work. 321 U.S. at 598. In *Jewell Ridge Coal Corp.* v. *Local No. 6167, UMW*, 325 U.S. 161, 163-166 (1945), the Court reaffirmed that conclusion. And in *Mt. Clemens*, 328 U.S. at 690-692, the Court held that walking from an employer's time clock to the employee's place of work and back is compensable work. *Mt. Clemens* also held that certain pre-shift activities, such as greasing arms and sharpening tools, are compensable work. *Id.* at 692-693. The Court further held, however, that pre- and post-shift activities do not require compensation when they involve only a few seconds or minutes of work beyond the scheduled working hours and therefore may be regarded as de minimis. *Ibid.*

Congress viewed *Mt. Clemens* as "creating wholly unexpected liabilities, immense in amount and retroactive in operation," 29 U.S.C. 251(a), and it enacted the Portal Act to address that "emergency." 29 U.S.C. 251(b). See *Steiner* v. *Mitchell*, 350 U.S. 247, 253 (1956). For claims arising before the date of the Act, the Portal Act eliminated employer liability for failure to pay minimum wage and overtime with respect to work that was not compensable by contract or custom. 29 U.S.C. 252.

Congress took a different approach to claims arising after the date of the Act. For those claims, Congress provided that, absent contract or custom, no employer shall be liable for failure to pay minimum wages or overtime for:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. 254(a). Thus, absent contract or custom, the Portal Act excludes from compensation travel and other preliminary and postliminary activities when they occur before employees begin their first principal activity or after they conclude their last principal activity of the day. Travel and other activities that occur between the first and last principal activities of a workday, however, are not excluded from compensation by the Portal Act.

In *Steiner*, the Court held that time employees were required to spend changing clothes and showering before and after their shifts was not excluded from compensation under the Portal Act as "preliminary and postliminary" activity. 350 U.S. at 252-253. The Court reasoned that the term "principal activity or activities" in the Portal Act encompasses all activities that are "an integral and indispensable part of the principal activities" an employee is hired to perform, *id.* at 253 (citation omitted), and that the required clothes-changing and showering at issue were an integral

and indispensable part of the employees' principal employment activities. *Id.* at 256.

The Department of Labor has issued regulations on the effect of the Portal Act. The regulations provide that the Portal Act has no effect on the compensability of activities that occur within the "workday," 29 C.F.R. 790.6(a), and define the workday to include all time within "the period between the commencement and completion on the same workday of an employee's principal activity or activities," "whether or not the employee engages in work throughout all of that period." 29 C.F.R. 790.6(b).

2. Respondent Barber Foods processes raw chicken into stuffed entrees, chicken fingers, and nuggets. Pet. App. 2a. Respondent's "production lines are staffed primarily by rotating associates, who generally rotate to different positions on the lines every two hours." *Id.* at 22a. Each line is also staffed with set-up operators, who ensure that machines are running smoothly. *Ibid.* In addition, respondent employs meatroom employees, shipping and receiving employees, maintenance employees, and sanitation employees. *Id.* at 24a-25a.

Respondent requires its employees to wear special clothing and equipment. Rotating associates must wear lab coats, hair nets, beard nets, earplugs, and safety glasses. Pet. App. 23a-24a. Set-up operators must wear those same items plus steel-toed boots, bump hats, and back belts. *Id.* at 24a & n.5. Set-up operators, meatroom employees, maintenance employees, and sanitation employees are required to carry lock-out and tag-out equipment. *Id.* at 24a- 25a.

Employees may store certain reusable items in their lockers or take them home and bring them back the next day. Pet. App. 25a. Employees are required to pick up gloves at a supply cage and lab coats at a coat rack. *Id.* at 26a. At times, employees are required to wait in line at the supply cage and coat rack. *Ibid.* At the end of the day,

employees are required to put their glove liners and lab coats in laundry bins located along the hallway between the production floor and the plant exit. *Id.* at 25a. Employees are required to put disposable items of clothing or equipment in trash bins located on the production floor or in the hallway. *Ibid.*

Respondent pays its employees based on the time recorded on a computerized time keeping system. Pet. App. 25a. Employees punch in at time clocks located at the entrances to the production floor and at certain other locations. *Id.* at 26a. They punch out at clocks located near production floor exits. *Ibid.* That clocking system does not capture the time that employees must spend at the beginning of the day waiting to receive their required gear, donning their gear, walking from one gear distribution station to another, and then walking to their work stations. It also does not capture the time they spend at the end of the day walking and then doffing their gear.

3. Petitioners are seven current employees and 37 former employees of respondent. Pet. App. 22a. They filed suit against respondent under the FLSA, seeking compensation for (1) the time they were required to spend donning and doffing their clothing and equipment, (2) the waiting time that is connected with that donning and doffing, and (3) the walking that occurs after donning and before doffing. *Id.* at 31a-32a.

The district court rejected petitioners' waiting and walking time claims, on the ground that such time is excluded from compensation under the Portal Act as preliminary and postliminary activity. Pet. App. 32a-34a. As to the donning and doffing claims, the court concluded that such time is integral to petitioners' principal work activities and therefore not excluded from compensation under the Portal Act. *Id.* at 36a-37a. The court submitted to a jury the question whether the time spent on those activities should be

excluded from compensation as de minimis. *Id.* 40a-41a. The jury determined that the donning and doffing time is de minimis, and the court entered judgment for respondent. *Id.* at 5a.

4. The court of appeals affirmed. Pet. App. 1a-19a. Relying on *Steiner*, the court concluded that the donning and doffing of required gear are integral and indispensable parts of the principal activities of respondent's employees. *Id.* at 7a. The court nonetheless held that the Portal Act excludes from compensation all walking and waiting time connected to that donning and doffing. *Id.* at 8a-14a.

The court rejected the position expressed by the Secretary of Labor in an amicus brief that, consistent with the Department's regulations, the Portal Act does not exempt from compensation any walking time that occurs after donning and before doffing when the donning and doffing are integral and indispensable parts of an employee's principal activities. Pet. App. 10a. The court concluded that the Secretary's position "overreaches" because it would mean that "an employee who dons required equipment supplied by the company at 5:00 a.m., at his own home, starts his workday for FLSA purposes at 5:00 a.m.—even though he is not required to punch in to work and does not punch in until 8:00 a.m." *Id.* at 9a. The court further concluded that the Court's decision in *Steiner* did not require the Secretary's interpretation because *Steiner* held that required donning and doffing is compensable, not that associated walking time is compensable. *Id.* at 10a & n.8. The court also believed that the Secretary's interpretation "pushes so far that it threatens to undermine the Portal-to-Portal Act." *Id.* at 10a.

The court of appeals further held that the time employees must spend waiting to don required gear is not compensable. Pet. App. 11a-12a. The court concluded that "a short amount of time spent waiting in line for gear is the type of activity

that the Portal-to-Portal Act excludes from compensation as preliminary." *Id.* at 12a.

Chief Judge Boudin filed a concurring opinion. Pet. App. 14a-19a. He suggested that it might be appropriate to "treat required donning and doffing as compensable where more than de minimis but, where it is not, leaving both it and any associated walking and waiting time as non-compensable." *Id.* at 18a.

SUMMARY OF ARGUMENT

I. The post-donning and pre-doffing walking time at issue here is compensable because it occurs during the workday. If, as the court of appeals held, the donning and doffing at issue here are integral parts of the employees' principal activities, then they are necessarily part of the workday, as are post-donning and pre-doffing walking time. Such walking is compensable under the FLSA and is not excluded from compensation by the Portal Act.

The FLSA generally requires compensation for "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson* v. *Mt. Clemens Pottery Co*, 328 U.S. 680, 690-691 (1946). The Portal Act creates a limited exception to that general rule, excluding from compensation "walking" and other "preliminary" and "postliminary" activities, but only when they occur outside the workday—either before an employee commences or after he completes his "principal activity or activities." 29 U.S.C. 254(a).

In *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), the Court held that the donning and doffing of clothing are "principal activities" within the meaning of the Portal Act when they "are an integral and indispensable part of the principal activities." *Id.* at 253 (citation omitted). Under *Steiner*'s interpretation of the Portal Act, when donning and doffing of clothing are integral and indispensable parts of the employees' principal activities, walking that occurs *after the*

commencement of donning and before the completion of doffing occurs during the workday. Such post-donning and pre-doffing walking therefore falls outside the Portal Act and is compensable.

Here, as in *Steiner*, donning and doffing are integral and indispensable parts of the employees' principal work activities, as both courts below held. Unless they don their required clothing, respondent's employees cannot perform their jobs. Accordingly, the walking that occurs after the commencement of donning and before the completion of doffing is compensable.

The Department of Labor's longstanding regulations confirm that the walking time at issue is compensable. Those regulations provide that the Portal Act does not apply to walking that occurs during the workday—after the commencement of an employee's first principal activity and before the completion of the employee's last principal activity. 29 C.F.R., 785.38, 790.6, 790.7(c). Because the walking time at issue occurs after the commencement of the principal activity of donning and before the completion of the principal activity of doffing, it is compensable under the regulations.

The Secretary's interpretation is consistent with the purposes of the Portal Act. That Act's principal purpose was to remedy an existing emergency that had been created by the Court's decision in *Mt. Clemens*, which held that walking from the time clock to an employee's work station and certain other pre-shift activities were compensable work. 328 U.S. at 691-694. That decision had created "wholly unexpected liabilities, immense in amount and retroactive in operation." 29 U.S.C. 251(a). Congress fully addressed that emergency by enacting a provision that relieved employers from all liability under the FLSA for activity that occurred before the enactment of the Portal Act, except where the activity was compensable under a contract or custom. 29 U.S.C. 252(a).

For prospective claims, Congress sought to preserve the existing law that had required compensation for all activities during the workday and had included within the workday pre- and post-shift activities that are closely connected to an employee's principal work activities. The only way in which Congress sought to cut back on existing law was by excluding from compensation walking and certain other pre- and post-shift activities that take place before the workday begins and after it ends. Because the walking time at issue occurs during the workday, the Secretary's position that such walking time is compensable is consistent with the purposes of the Portal Act.

II. The waiting time at issue is also compensable. In general, waiting time is compensable under the FLSA when an employee is required to wait and he cannot use the time effectively for his own purposes. *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944); 29 C.F.R. 785.15. That is true here, because respondent's employees cannot work without obtaining their gear, and they must wait in line to obtain that gear.

Nor is the waiting time excluded by the Portal Act. When employees must wait in order to perform a principal activity, the waiting is an integral and indispensable part of that principal activity and falls outside the Portal Act. 29 C.F.R. 790.7(h). Because the donning in this case is a compensable principal activity, the waiting that is connected to it is also compensable.

ARGUMENT

I. THE POST-DONNING AND PRE-DOFFING WALKING TIME AT ISSUE IS COMPENSABLE BECAUSE IT OCCURS DURING THE WORKDAY

The court of appeals correctly concluded that the donning and doffing of required clothing and equipment are integral and indispensable parts of the principal work activities of

respondent's employees. It nonetheless held that the Portal Act excludes from compensation the time those employees must spend walking from gear distribution stations to their work stations at the beginning of the day and from their work stations to where they doff their gear at the end of the day. That holding is incorrect. Donning and doffing that are integral and indispensable parts of an employee's principal work activities are themselves principal activities within the meaning of the Portal Act, *i.e.*, they are part of the employees' workday. Moreover, the Portal Act does not exclude from compensation walking time that occurs after an employee commences his principal activities and before he completes them, *i.e.*, during the workday.

A. The Walking Time At Issue Is Compensable Under The Language Of The Portal Act As Interpreted In *Steiner*

The FLSA generally requires compensation for "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson* v. *Mt. Clemens*, 328 U.S. 680, 690-691 (1946). That general rule reflects Congress's judgment that an employee should generally receive compensation for all time that he is under the direction or control of the employer. *Tennessee Coal, Iron & R.R.* v. *Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). The Portal Act creates a limited exception to that general rule. The text of the Portal Act excludes from compensation "walking" to and from "the actual place of performance" of an employee's principal activity or activities, and other "preliminary" and "postliminary" activities, but only when they occur outside the workday—"either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. 254(a). Walking that occurs during the workday—after the employee commences his first principal activity and before he concludes his

last principal activity—is not affected by the Portal Act. Instead, such walking is compensable in accordance with the general rule that compensation is required for all time the employee is required to be "on the employer's premises, on duty or at a prescribed workplace." *Mt. Clemens*, 328 U.S. at 691.

An example illustrates the interaction between the FLSA's general compensation rule and the limited exception created by the Portal Act. If an employee's job is to work at several different stations on an assembly line, and he is required to report at the beginning of each day to the first station, the Portal Act excludes from compensation the walk from the factory entrance to the first station. The Portal Act also excludes from compensation the walk from the last work station to the place where the employee clocks out. In contrast, the walk from the first station to the second station and all subsequent walks from one station to another are compensable. The first and last walks are excluded from compensation because they occur outside the workday. 29 U.S.C. 254(a)(1). The walks in between, however, occur after the first principal activity and before the last principal activity of the workday and are therefore compensable in accordance with the FLSA's general rule that an employee is entitled to compensation for all time he is required to spend on the employer's premises, on duty or at a prescribed workplace.

2. Because the Portal Act only excludes from compensation walking that occurs before an employee's first principal activity and after the employee's last principal activity, the scope of the Portal Act's exclusion depends on the meaning of the term "principal activity." The Court addressed the meaning of that term in *Steiner*. In that case, the Court held that the term "principal activity or activities" in the Portal Act "embraces all activities which are an integral and indispensable part of the principal activities." 350

U.S. at 252-253 (citation omitted). Based on that interpretation, the Court held that clothes changing and showering that are integral and indispensable parts of an employee's principal job activities are themselves principal activities and therefore fall outside the scope of the Portal Act's exclusion for preliminary and postliminary activity. *Id.* at 256. Under the Court's analysis, clothes changing and showering that are integral and indispensable parts of a principal activity are compensable as principal activities, without regard to whether they occur on or off the production floor, and without regard to whether they occur before, during, or after an employee's scheduled shift. *Ibid.* See *Mitchell* v. *King Packing Co.*, 350 U.S. 260, 261-263 (1956) (knife-sharpening by meat packers at the beginning and end of their shifts is an integral and indispensable part of their principal activities and therefore compensable).

3. Applying the terms of the Portal Act as interpreted in *Steiner* to the circumstances of this case, the walking time at issue is compensable. In order to perform their jobs, respondent's employees are required to don and doff clothing and equipment on respondent's premises. Pet. App. 24a-25a. Accordingly, here, as in *Steiner*, donning and doffing are integral and indispensable parts of the employees' principal job activities. Because the donning and doffing are integral and indispensable parts of the employees' principal activities, they are themselves "principal activities" as that term is used in the Portal Act. And because donning and doffing are principal activities, they are part of the workday.[1] The walking that occurs after the commencement of the principal

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[1] In this case, the workday of respondent's employees actually begins when they wait in line to obtain required gear. See Argument II, *infra*. If there were no waiting time or the Court were to hold that the wait does not begin the employees' workday, their day would begin with the commencement of donning. In either event, the walking time at issue occurs during the workday and is therefore compensable.

activity of donning and before the conclusion of the principal activity of doffing falls outside the Portal Act: It does not occur "prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. 254(a). Such walking is therefore compensable in accordance with the general rule that all time spent on the employer's premises, on duty or at a prescribed workplace is compensable.

4. The court of appeals acknowledged that, under *Steiner*, the donning of required gear is an integral and indispensable part of the principal activities of respondent's employees and therefore not excluded from compensation as preliminary activity under the Portal Act. Pet. App. 7a. The court nonetheless ruled that such donning could not start the workday and thereby require compensation for walking time that occurs after the commencement of donning and before the end of the workday. *Id.* at 9a.

The court of appeals' analysis is mistaken. The operative language of the Portal Act excludes from compensation only those activities that occur before an employee commences, and after he concludes, his "principal activity or activities." 29 U.S.C. 254(a). That operative language determines the compensability of both a particular preparatory activity and the associated walking that occurs after that activity and before the end of the workday. If a particular preparatory activity is an integral and indispensable part of a principal activity such that it qualifies as a "principal activity" (in accordance with *Steiner*), that *necessarily* means that the activity itself does not occur "prior to" the commencement of the employee's "principal activity or activities," and it necessarily follows that walking that occurs *after* that activity cannot occur "prior to" the commencement of the employee's "principal activity or activities." *Ibid.* "To give these same words a different meaning for each category would be to

invent a statute rather than interpret one." *Clark* v. *Suarez Martinez*, 125 S. Ct. 716, 722-723 (2005). An activity that is an integral and indispensable part of a principal activity is either a "principal activity" under the Portal Act or it is not. It cannot be a principal activity for purposes of determining the compensability of that activity and not a principal activity for purposes of determining the compensability of *subsequent* walking. *Id.* at 723. Because *Steiner* held that an activity that is an integral and indispensable part of a principal activity is itself a principal activity, both the activity itself and walking that occurs after the commencement of that activity and before the end of the workday fall outside the Portal Act.

For that reason, the court of appeals' observation (Pet. App. 10a n.8) that *Steiner* did not expressly address the compensability of walking time is beside the point. *Steiner*'s interpretation of the term "principal activity" necessarily means that, if donning and doffing are themselves compensable principal activities, the walking that occurs after the commencement and before the conclusion of those principal activities falls outside the scope of the Portal Act.

B. The Department Of Labor's Regulations Confirm The Compensability Of The Walking Time At Issue Here

1. The Department of Labor has issued interpretive regulations setting forth the principles for determining the number of hours worked, 29 C.F.R. Pts. 785 *et seq.*, and addressing the effect of the Portal Act on that computation. 29 C.F.R. Pts. 790 *et seq.* The hours-worked regulations have their origin in Interpretive Bulletin No. 13, which was originally issued in 1939 (shortly after enactment of the FLSA), and which was in effect when Congress enacted the Portal Act. The Portal Act regulations were originally issued in 1947, immediately after enactment of that Act. See 12 Fed. Reg. 7655. Those contemporaneous and long-standing regulations, which have been left undisturbed by

Congress in its numerous subsequent reexaminations of the FLSA and which reflect the considered and detailed views of the agency charged with enforcing the FLSA and the Portal Act, are entitled to deference. See *Barnhart* v. *Walton*, 535 U.S. 212, 221-222 (2002) (*Chevron* deference appropriate absent notice-and-comment rulemaking in light of "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given to the question over a long period of time"); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944) (Administrator's FLSA interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance").[2]

The Department's hours-worked and Portal Act regulations reinforce the conclusion that walking is compensable when it occurs after the commencement and before the completion of compensable donning and doffing. The regulations explain that compensable work generally includes all time "during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place." 29 C.F.R. 785.7 (citation omitted). That general rule applies not only to the time that an employee is involved in productive work, but also to required waiting time, 29 C.F.R. 785.7, 785.14-785.17, normal rest periods, 29 C.F.R. 785.18, and travel during the course of the workday. 29 C.F.R. 785.38. The regulations except from that general rule and treat as non-compensable "bona fide meal periods," 29 C.F.R. 785.19, and "[p]eriods during which an employee is

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[2] In 1949, moreover, as this Court indicated in *Steiner*, Congress amended the FLSA but specifically retained the Portal Act regulations, without expressing any disagreement with the provisions relevant here. See 350 U.S. at 255 & n.8; Fair Labor Standards Amendments of 1949, ch. 736, § 16, 63 Stat. 920.

completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes." 29 C.F.R. 785.16.

The regulations explain that the Portal Act creates only a limited exception to the general rule that an employee is entitled to compensation for activities that occur while the employee is on the employer's premises, on duty or at a specified work station. The regulations state that the Portal Act has no effect on the compensability of activities that occur within the "workday," 29 C.F.R. 790.6(a), and define the workday to "include[] *all time* within" the "period between the commencement and completion on the same workday of an employee's principal activity or activities," "whether or not the employee engages in work throughout all of that period." 29 C.F.R. 790.6(b) (emphasis added). Thus, "[p]eriods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted." 29 C.F.R. 790.6(a).

The regulations specifically address the effect of the Portal Act on the compensability of travel. They explain that while time spent walking from the plant gate to the place where the employee performs his principal activity is excluded by the Portal Act from the category of "principal activities" and is not compensable, 29 C.F.R. 790.7(f), 790.8(a), travel from the place of performance of one principal activity to the place of performance of another principal activity is not subject to the Portal Act (because it occurs during the workday) and is instead subject to the general rules for determining compensability under the FLSA. 29 C.F.R. 790.7(c).

Under the FLSA, "[t]ime spent by an employee in travel as part of his principal activity, such as travel from job site

to job site during the workday, must be counted as hours worked." 29 C.F.R. 785.38. When an employee is required to report to a designated place to pick up his tools, for example, and must then travel to another location to perform his work, "the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked." *Ibid.* Similarly, the regulations specify that if an employee is required to report to a designated place for instructions, the travel from the place where he receives his instructions to the place where he carries out those instructions must be counted as hours worked. *Ibid.* In those examples, picking up tools and receiving instructions are integral and indispensable parts of the employees' principal activity or activities, and accordingly qualify as principal activities for purposes of the Portal Act. 29 C.F.R. 790.8(b). As a result, the travel that occurs after those initial activities and before the end of the workday falls outside the Portal Act.

This case is controlled by the foregoing principles. As both courts below found (Pet. App. 7a, 36a-37a), the donning and doffing of required gear on respondent's premises are integral and indispensable parts of the principal activities of respondent's employees because their work cannot be done without that gear. See 29 C.F.R. 785.24, 790.8(c). The employees' workday therefore commences no later than donning and ends with doffing, and the necessary walking that occurs between those two points falls outside the Portal Act and is compensable under the FLSA.

2. In accordance with the interpretation of the Portal Act expressed in the regulations, the Secretary of Labor has consistently taken the position in litigation that walking that occurs after compensable donning and before compensable doffing is itself compensable. Thus, for example, the Secretary filed suit seeking compensation for such walking time in *Reich* v. *IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994). The Secre-

tary entered into a consent judgment in *Chao* v. *Perdue Farms, Inc.*, Case No. 2:02-CV-0033 (M.D. Tenn. entered May 10, 2002), that requires the employer to compensate employees for walking that occurs between the donning and doffing of required gear. The Secretary is currently engaged in two district court proceedings in which she is seeking compensation for such walking. *Chao* v. *Tyson Foods, Inc.*, No. 02-CV-1174 (N.D. Ala. filed May 9, 2002); *Chao* v. *George's Processing, Inc.*, No. 6:02-CV-03479-RED (W.D. Mo. filed Nov. 20, 2002). And the Secretary filed amicus briefs in the courts of appeals in this case and in *Alvarez* v. *IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), cert. granted, 125 S. Ct. 1292 (2005), taking the position that such post-donning and pre-doffing walking time is compensable.

3. The court of appeals concluded that the force of the Department of Labor's longstanding regulations and the Department's consistent practice is offset by footnote 49 of the Portal Act regulations. Pet. App. 8a-9a (citing 29 C.F.R. 790.7(g) n.49); *id.* at 10a (concluding that the Department of Labor's regulations "cut both ways"). The footnote states:

> Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity." This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

29 C.F.R. 790.7(g) n.49 (citations omitted).

The exact import of the footnote is unclear on its face, particularly in light of the fact that the first-quoted sentence refers to postliminary activity whereas the second sentence seems to contemplate travel occurring *after* the washing or

clothes-changing activity at issue (which, in the case of travel after postliminary activity, would certainly be excluded from otherwise compensable time by the Portal Act in any event). At most, this passage could be read to reserve the possibility that there might be some circumstances in which the compensability of donning and doffing would not automatically lead to the conclusion that associated walking time falls outside the Portal Act. Even that reading would provide no support for the court of appeals' holding that the Portal Act always excludes such walking from compensation.

In any event, the ambiguous passage cited by the court of appeals should not obscure the following points. First, the regulations discussed above reflect the Department of Labor's long-established general position that walking that occurs after the commencement of donning and before the completion of doffing falls outside the Portal Act when the donning and doffing are integral and indispensable parts of an employee's principal activities. Second, in the many years in which the Department has enforced the FLSA and the Portal Act, it has not issued any ruling identifying any circumstance in which such walking would be excluded from compensation under the Portal Act. And third, the Secretary has repeatedly taken the position in litigation that, in circumstances like those presented here, the Portal Act does not exclude from compensation walking that occurs after the commencement and before the completion of compensable donning and doffing. In those circumstances, the regulations as a whole support the Secretary's position that the walking time at issue in this case is compensable.

Any doubt regarding the meaning of the regulations must be resolved in favor of the Secretary's interpretation. As this Court has recognized, courts "must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994); see *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997) (deferring to

agency's interpretation of its regulations as set forth in amicus brief). The detailed and comprehensive regulations discussed above, when read as a whole, plainly support the Secretary's longstanding and consistent position regarding the compensability of walking time like that at issue here. And in any event, that conclusion is also compelled by the text of the Portal Act as interpreted in *Steiner*.

C. The Secretary's Position Is Consistent With The Purposes Of The Portal Act And Does Not Produce The Consequences That Concerned The Court Of Appeals

1. The court of appeals rejected the Secretary of Labor's position regarding the compensability of the walking time at issue here in large part because the court concluded that the Secretary's position would defeat the purposes of the Portal Act. Pet. App. 10a. That conclusion reflects a misunderstanding of the purposes of that Act.

The principal purpose of the Portal Act was to remedy an existing "emergency" that had been created by the Court's decision in *Mt. Clemens*, which held that walking from the time clock to an employee's work station and certain other preliminary activities were compensable work. See 29 U.S.C. 251(b); *Steiner*, 350 U.S. at 253. Employees filed numerous claims in the wake of *Mt. Clemens*, and Congress believed that if those claims were allowed to proceed it would create "wholly unexpected liabilities, immense in amount and retroactive in operation." 29 U.S.C. 251(a). As the Court explained in *Steiner*, 350 U.S. at 255-256, Congress fully addressed that emergency by enacting Section 2 of the Portal Act, 29 U.S.C. 252, which relieved employers from all liability under the FLSA for activity that occurred before the enactment of the Portal Act, and eliminated federal court jurisdiction to adjudicate such claims, except where the activity was compensable under a contract or custom. See *Battaglia* v. *General Motors Corp.*, 169 F.2d 254 (2d Cir.), (upholding the constitutionality of Section 2), cert. denied, 335 U.S. 887 (1948).

Congress addressed prospective claims in Section 4 of the Act, 29 U.S.C. 254. For those claims, Congress did not intend any equivalent change from existing law. As the Court explained in *Steiner*, had Congress intended such a sweeping change, it would have made Section 2 prospective as well as retroactive. 350 U.S. at 255-256. Instead, by limiting Section 4 to activities outside the workday, and by using the term "principal activities" to mark the boundaries of the compensable workday, Congress largely sought to "preserve[] to the employee the rights and the benefits and the privileges which have been given to him under the Fair Labor Standards Act." 350 U.S. at 256 (appendix) (quoting 93 Cong. Rec. 2297 (1947) (statement of Sen. Cooper)).

Before enactment of the Portal Act, the Administrator and courts had taken the position that pre- and post-shift activities are compensable when they are closely connected to principal job activities, and Congress intended to preserve that development. 93 Cong. Rec. at 2297. Congress was confident that its use of the term "principal activities" would have that effect because it understood that term to encompass not only the activities that occur during an employee's normal shift, but also pre-shift and post-shift activities that are an integral and indispensable part of those principal activities, such as oiling machinery, sharpening tools, handing out clothes, and changing clothes. *Id.* at 2297-2298. See *Steiner*, 350 U.S. at 255. The only way in which Congress sought to cut back on existing law was by excluding from compensation those preliminary and postliminary activities that are not integral and indispensable parts of an employee's principal activities. See 29 U.S.C. 254(a)(1) and (2); 93 Cong. Rec. at 2299 (statement of Sen. Cooper).

Thus, the Secretary's position—*i.e.*, that walking time that occurs after donning and before doffing is compensable when the donning and doffing are integral and indispensable

parts of an employee's principal activity—is fully consistent with the purposes underlying the Portal Act. The court of appeals' position, by contrast, conflicts with this Court's recognition in *Steiner* that "Congress * * * did not intend to deprive employees of the benefits of the Fair Labor Standards Act where [the activities at issue] are an integral part of and indispensable to their principal activities." 350 U.S. at 255.

2. The court of appeals also believed that adoption of the Secretary's position would produce consequences that Congress could not have intended. The court hypothesized that, under the Secretary's position, "an employee who dons required equipment supplied by the company at 5:00 a.m., at his own home, starts his workday for FLSA purposes at 5:00 a.m.—even though he is not required to punch in to work and does not punch in until 8:00 a.m." Pet. App. 10a. The Secretary's position does not lead to that consequence.

Under the Secretary's longstanding interpretation of the Portal Act, when an employee has the option to don and doff required clothing and gear at home, that activity is not integral, not compensable, and does not begin or end the workday. The Department's regulations specify that the donning of required equipment is a compensable principal activity "where the changing of clothes *on the employer's premises* is required by law, by rules of the employer, or by the nature of the work." 29 C.F.R. 790.8 n.65 (emphasis added). The Wage and Hour Field Operations Handbook, which provides official guidance for the Department of Labor's FLSA investigations, elaborates on the Secretary's position. It states that "[e]mployees who dress to go to work in the morning are not working while dressing even though the uniforms they put on at home are required to be used in the plant during working hours. Similarly, any changing which takes place at home at the end of the day would not be an integral part of the employees' employment and is not

working time." Department of Labor, *Wage and Hour Field Operations Handbook* § 31b13 (1996).

The court of appeals concluded that there was no basis for the Secretary's distinction between donning clothes on an employer's premises and performing that activity at home. Pet. App. 9a-10a. But that distinction reflects the Secretary's reasonable judgment that employer control is an important factor in determining whether an activity is an integral and indispensable part of an employee's principal activities. When an employer dictates that the clothes-changing process take place at the work site, the time involved is effectively no longer the employee's. Cf. *Mt. Clemens*, 328 U.S. at 691 (distinguishing compensable on-premise walking time from uncompensable commuting time in part on the ground that "[t]he employees' convenience and necessity * * * bore no relation whatever to this walking time; they walked on the employer's premises only because they were compelled to do so"). In contrast, an employee who dons required gear at home is engaged in activity that is analogous to that of any employee who dresses for work in the morning. The Secretary's emphasis on the degree of employer control also ameliorates any concern about undermining the purposes of the Portal Act in light of the Act's prospective focus.

D. The Amount Of Time Devoted To Donning And Doffing Does Not Affect The Compensability of Associated Walking Time

In his concurring opinion, Chief Judge Boudin suggested that the compensability of walking associated with donning and doffing should depend on whether donning and doffing involves so little time that it should be regarded as de minimis. Pet. App. 18a. That approach reflects an inappropriate application of the de minimis rule.

1. The Court held in *Mt. Clemens* that an employee is not required to compensate an employee for time spent

on walking and other preliminary activities when they involve only a "few seconds or minutes of work beyond the scheduled working hours," and therefore may be regarded as "de minimis." 328 U.S. at 692. That de minimis rule, however, has nothing to do with whether an activity begins or ends the workday for purposes of the Portal Act. Instead, under the language of the Portal Act, any "principal activity" can begin and end the workday, regardless of how long that activity takes to perform. 29 U.S.C. 254(a).

The legislative history to the Portal Act confirms that conclusion. During the course of the Senate debates, Senator McGrath asked Senator Cooper whether an employee's preshift activity of handing out clothes in the morning had to consume at least 30 minutes before it would be regarded as a "principal activity." Senator Cooper responded that it would be a principal activity whether it took "15 or 10 minutes or five minutes or any other number of minutes." 93 Cong. Rec. at 2298. In *Steiner*, the Court placed special weight on the views of Senator Cooper in determining the meaning of the Portal Act. See 350 U.S. at 256-259.

The Department of Labor's regulations similarly do not require that a preparatory activity consume a particular period of time before it is considered a "principal activity." See 29 C.F.R. 790.8(b) n.63 (construing legislative history to indicate that "any amount of time" will suffice). The relevant question under the regulations is instead whether the preparatory activity is an integral part of a principal activity. 29 C.F.R. 790.8(b). The examples cited in the regulations of picking up tools or receiving instructions before traveling to a work site demonstrate that the amount of time devoted to an activity is not material in determining whether it is a principal activity that starts the workday. Picking up tools or receiving instructions might take only a few minutes or less. But as the regulations make clear, both activities are principal activities that can begin the workday, thereby

rendering subsequent travel time excluded from the scope of the Portal Act and compensable under the FLSA.

2. The nature of the de minimis rule explains why it plays no role in determining whether a particular activity begins or ends the workday. Properly understood, that rule does not apply separately to each particular activity viewed in isolation. A de minimis determination instead requires consideration of the aggregate amount of time for which an employee seeks compensation. *Kosakow* v. *New Rochelle Radiology Assocs.*, 274 F.3d 706, 719 (2d Cir. 2001); *Brock* v. *City of Cincinnati*, 236 F.3d F.3d 793, 804-805 (6th Cir. 2001); *Reich* v. *Monfort, Inc.*, 144 F.3d 1329, 1333-1334 (10th Cir. 1998); *Bobo* v. *United States*, 136 F.3d 1465, 1468 (Fed. Cir. 1998); *Lindow* v. *United States*, 738 F.2d 1057, 1063 (9th Cir. 1984); *Dunlop* v. *City Elec., Inc.*, 527 F.2d 394, 401 (5th Cir. 1976).

Practical considerations support that approach. An activity-by-activity approach would lead to complex threshold inquiries aimed at delineating the relevant activities for purposes of applying the de minimis rule. Almost any activity can be broken down into constituent parts that could be conceptualized as individual activities. For example, donning could be broken down into the separate activities of putting on a lab coat, putting on a hair net, putting on earplugs, and putting on safety glasses. At the same time, almost any activity could be conceptualized as part of a larger activity. For example, donning, doffing, associated waiting, and associated walking could be conceptualized as one activity —the process of donning and doffing. Applying the de minimis analysis to the aggregate amount of otherwise compensable time avoids the complex threshold questions required by an activity-by-activity approach.

More fundamentally, viewing a particular activity in isolation as de minimis and therefore non-compensable would thwart the purposes of the FLSA. For example, an activity-

by-activity approach would allow an employer to require employees to perform a series of activities at the beginning and end of the day that each consume a brief period, but that in the aggregate require 30 minutes of work, and then pay his employees for only eight hours of work, rather than for the 8 1/2 hours the employees actually worked. The de minimis rule is designed to discourage the filing of lawsuits that involve truly insubstantial claims, not to provide the employer with a mechanism for obtaining from his employees a free half-hour of work each day. For that reason, the de minimis rule must be applied to the aggregate period of time for which an employee seeks compensation.

Thus, under the de minimis rule, it is irrelevant whether the donning and doffing, considered in isolation, consume a de minimis amount of time. Rather, the relevant question is whether the aggregate amount of time devoted to donning, doffing, associated walking, and associated waiting is de minimis. If the aggregate time is de minimis, all of the time is non-compensable, even if it occurs during the workday. On the other hand, if the aggregate time is not de minimis, the de minimis rule is simply inapplicable. It plays no role in determining when the workday begins and ends.[3]

II. THE WAITING TIME AT ISSUE IS COMPENSABLE BECAUSE RESPONDENT'S EMPLOYEES ARE REQUIRED TO WAIT AND THE WAITING IS AN INTEGRAL AND INDISPENSABLE PART OF THE PRINCIPAL ACTIVITY OF DONNING

The court of appeals also erred in holding that the time that employees must spend waiting to receive their clothing and equipment is not compensable. That time is com-

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[3] In this case, the jury determined that donning and doffing, when viewed in isolation, consume a de minimis amount of time. The jury did not consider, however, whether donning, doffing, associated walking, and associated waiting, when viewed in the aggregate, consume a de minimis amount of time.

pensable because the waiting is an integral and indispensable part of the principal activity of donning.

1. In general, waiting time is compensable under the FLSA when an employee is "engaged to wait" rather than waiting to be engaged. See *Skidmore*, 323 U.S. at 136-137. An employee is engaged to wait when the "time is spent predominantly for the employer's benefit," rather than for the employee's. *Armour*, 323 U.S. at 133. Thus, when an employer requires the employee to wait and the employee cannot use the waiting time effectively for his own purposes, such waiting time is generally compensable. 29 C.F.R. 785.15. A messenger who reads the newspaper while waiting for an assignment, a firefighter who plays checkers while waiting for an alarm bell, and a factory worker who talks to fellow employees while waiting for his machine to be repaired are all engaged in compensable waiting. See *ibid.*

The waiting time at issue in this case is required by the employer and cannot be used effectively by the employees for their own purposes. Respondent's employees cannot perform their jobs without obtaining required gear, and in order to obtain that gear, they must wait in lines at distribution points. Respondent's employees are therefore engaged to wait, rather than waiting to be engaged.

Nor does the Portal Act exclude that waiting time from compensation as a preliminary activity, as the court of appeals concluded. See Pet. App. 10a-12a. As already discussed, the Portal Act does not exclude from compensation preliminary activities that are integral and indispensable parts of principal activities. Because donning required gear and equipment is a principal activity, and respondents' employees are required to wait in line to undertake that principal activity, that waiting is an integral and indispensable part of the principal activity of donning.[4]

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[4] Because the initial wait is an integral and indispensable activity, it begins the workday of respondent's employees. Even if that initial wait

2. The Department of Labor's regulations confirm that the waiting time at issue in this case is compensable. Under the regulations, when an employer requires its employees to wait to undertake a principal activity, the waiting is treated as an integral and indispensable part of that principal activity. The regulations specifically explain that when an employee "is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities." 29 C.F.R. 790.7(h).

In contrast, when the wait is occasioned by a voluntary early arrival, it is treated as a non-compensable preliminary activity. See 29 C.F.R. 790.7(h). Similarly, when the wait is connected with a non-compensable preliminary or postliminary activity, rather than with a principal activity, the wait is generally treated as preliminary or postliminary as well. For example, because checking in (or punching a time card) at the beginning of the day, and checking out at the end of the day, are preliminary and postliminary activities rather than principal work activities, the regulations treat normal waiting time associated with those activities as non-compensable preliminary and postliminary waiting. 29 C.F.R. 790.7(g). Similarly, because obtaining a pay check at the end of the day is a postliminary activity and not a principal work activity, the regulations treat normal waiting

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did not begin the workday, however, waiting that occurs after the commencement of donning and before the completion of doffing would occur during the workday for the reasons explained in Argument I, *supra*. Accordingly, such waiting would be compensable even if the initial wait were not.

time associated with obtaining a pay check as a non-compensable postliminary activity. *Ibid.*

Under the regulations, as under *Skidmore* and *Armour*, the waiting time at issue in this case is compensable. It is required, rather than volitional. And it is an integral and indispensable part of the primary activity of donning, not a component of a non-compensable preliminary or postliminary activity such as checking in or obtaining a pay check. The court of appeals therefore erred in holding such waiting time non-compensable.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MAY 2005

Supreme Court, U.S.
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MAY 16 2005
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No. 04-66 12

IN THE

Supreme Court of the United States

Abdela Tum, et al.,

Petitioners,

v.

Barber Foods, Inc., d/b/a Barber Foods,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

JOINT APPENDIX

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Petition for Certiorari filed July 8, 2004

Certiorari granted February 22, 2005

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U.S. District Court
District of Maine (Portland)
CIVIL DOCKET FOR CASE #: 2:00-cv-00371-GC

Date Filed	#	Docket Text
12/12/2000	1	COMPLAINT filed; FILING FEE $ 150.00 RECEIPT # 42058; jury demand (Service of Process Deadline 4/11/01) (mmc) (Entered: 12/12/2000)
01/05/2001	2	ANSWER to Complaint by BARBER FOODS INC (Attorney GRAYDON STEVENS), (ckb) (Entered: 01/05/2001)
11/14/2001	22	STATEMENT of Material Fact by BARBER FOODS INC (mjl) (Entered: 11/14/2001)
12/05/2001	29	RESPONSE TO STATEMENT of Material Fact by ALL PLAINTIFFS re: [22-1] fact statement (mjl) (Entered: 12/06/2001)
01/23/2002	41	RECOMMENDED DECISION of MAG. JUDGE DAVID M. COHEN Re: [21-1] motion for Summary Judgment ; Motion no longer referred Objections to R and R due by 2/12/02 for ALL PLAINTIFFS, for BARBER FOODS INC ; cc:cnsl (ckb) (Entered: 01/24/2002)
02/20/2002	49	ORDER Affirming [41-1] motion RECOMMENDED DECISION of MAG. JUDGE DAVID M. COHEN Re: [21-1] motion for Summary Judgment,

		granting in part, denying in part [21-1] motion for Summary Judgment (signed by JUDGE GENE CARTER) cc: cnsl (mjl) (Entered: 02/20/2002)
04/29/2002		JURY TRIAL BEGUN before JUDGE GENE CARTER (Court Reporter: Pauline Terry) (mjl) (Entered: 04/29/2002)
05/01/2002	56	Jury Verdict for BARBER FOODS INC (cc: cnsl) (ckb) (Entered: 05/01/2002)
05/03/2002	58	JUDGMENT for BARBER FOODS INC against ALL PLAINTIFFS signed by William S. Brownell, Clerk. cc: cnsl (EOD: 5/3/02): In accordance with the parties' joint stipulation of dismissal reached during the final pretrial conference held on December 6, 2001 before Magistrate Judge David M. Cohen, judgment of dismissal is hereby entered as to plaintiffs Brad Reynolds, Scott Knox and Michael Smith. In accordance with Judge Gene Carter's Order Affirming the Recommended Decision of the Magistrate Judge on Defendant's Motion for Sanctions dated February 20, 2002 (Pleading No. 48) and Judge Gene Carter's Order Affirming the Recommended Decision of the Magistrate Judge on Defendant's Motion for Summary Judgment dated February 20, 2002 (Pleading No. 49), judgment is hereby entered in favor of Barber Foods, Inc. d/b/a Barber Foods and against Gordon Lemire, Lisa

		Morgan, Tatyana Novika, Robert Ouellette, Mark Aitkenhead, Cory Chase, Toan Dang, William Devine, Angela Dumont, Mohammed Habibzai, Peter Hamilton, Diane Keraghan, Lee LeCroix, Gladstone Lewis and Kyra Perdue. This action came on for trial before the Court and a jury, Honorable Gene Carter, District Judge, presiding, and the issues having been duly tried and the jury having rendered its verdict, judgment is hereby entered in favor of Barber Foods, Inc. d/b/a Barber Foods and against Nicholas Bearce, Allison Carey, Celso Florendo, Letecheal Hailu, Robert Huntley, Ken LeMarche, Ernest Levesque, Natalie Luongo, Paul Mason, Derso Mekonen, The Ngo, Tadeusz Olsyzynski, Joseph Raymond, Doug Robito, Najib Sayed, Laurie Secord, Kevin Snow, Evelyn Theunissen, Abdela Tum, Heidi Wallace and Mintwab Yimam. (ckb) (Entered: 05/03/2002)
05/31/2002	59	NOTICE OF APPEAL by ALL PLAINTIFFS FILING FEE $ 105 RECEIPT # 45653 re: 48, 49, 58 (bfa) (Entered: 05/31/2002)

General Docket
US Court of Appeals for the First Circuit

Court of Appeals Docket #: 02-1679 Filed: 6/10/02

ABDELA TUM; NAJIB SAYED; CELSO FLORENDO; TADEUSZ OLSZYNSKI; NICHOLAS BEARCE; ALLISON CAREY; LETECHEAL HAILU; ALBERT HOWARD; ROBERT HUNTLEY; KEN LAMARCHE; ERNEST LEVESQUE; NATALIE (LUONGO) LEYLAND; PAUL MASON; DERSO MEKONEN; THE HUU NGO; JOSEPH RAYMOND; ROBERT RUBIN; DOUG RUBITO; LAURIE SECORD; KEVIN SNOW; EVELYN THEUNISSEN; HEIDI WALLACE; MINTWAB YIMAM; MARK AITKENHEAD; SHAUN ALBAIR; ERLINDA CARTER; SANDRA CHADBOURNE; CORY CHASE; TOAN DANG; WILLIAM DEVINE; ANGELA DUMONT; MOHAMMED HABIBZAI; PETER D. HAMILTON; DIANE KERAGHAN; LEE LACROIX; GORDON LEMIRE; LISA MORGAN; TATYANA NOVIKOVA; ROBERT OUELLETTE; BELETU A. SMITH; TIMOTHY C. SMITH; KYRA L. PARDUE; BRADFORD D. REYNOLDS; SCOTT KNOX; MICHAEL F. SMITH; GLADSTONE LEWIS,

Plaintiffs - Appellants/Cross - Appellees,

v.

BARBER FOODS INC., d/b/a Barber Foods,

Defendant - Appellee/Cross - Appellant.

1/10/03	CASE ARGUED 01/10/03. Boudin, Ch. J., Torruella, Lynch, JJ. (ceca) [02-1679 02-1739]
6/3/03	OPINION filed by Chief Judge Michael Boudin, Judge Juan R. Torruella and Judge Sandra L. Lynch, signed by Judge Juan R. Torruella, PUBLISHED. [02-1679, 02-1739] (darl) [02-1679 02-1739]
6/3/03	JUDGMENT filed by Chief Judge Michael Boudin, Judge Juan R. Torruella and Judge Sandra L. Lynch, closing case. The judgement of the district court is affirmed. [02-1679, 02-1739] (darl) [02-1679 02-1739]
6/17/03	PETITION FOR PANEL REHEARING AND REHEARING ENBANC filed by Appellants Abdela Tum, et al. Certificate of Service dated 6/16/03. [02-1679, 02-1739] (darl) [02-1679 02-1739]
6/17/03	BRIEF filed by Amicus Curiae U.S. Department of Labor in support of Apellant's Abdela Tum, et al, petition for panel rehearing and rehearing en banc. Length: 15 pages, Copies:8, delivered by mail. Certificate of service date 6/17/03. [02-1679, 02-1739] (darl) [02-1679 02-1739]
8/18/03	ORDER filed by Chief Judge Michael Boudin. The Secretary of Labor is requested to supplement its amicus brief by stating briefly its position on the following issues, including its basis for its positions: 1. Assuming arguendo that (as the Secretary contends) the donning and doffing of required

clothes is ordinarily integral to a principal activity, does such donning and doffing start and end the workday where the donning and doffing is itself de minimus; 2. On the same arguendo assumption that donning and doffing is part of a principal activity-- is waiting in line to obtain the initial required clothes part of the principal activity; 3. Assuming that in some situations doffing and donning is covered by the statute (e.g., required clothes) and in other situations not (e.g., non-required clothes), how does the Secretary propose that the employer calculate hours covered by the statute where, as appears to be so in this case, employees may vary individually, and from day to day, in the order in which they stand in line for required or non-required clothes and walk between different points before actually "punching in" and in which the time spent on such activities itself varies from one day to the next. The Secretary is requested to file its response, which may be in memorandum form with an original and six copies, within 21 days of the date of this order and to serve one copy on counsel for other parties. Such other parties may respond with memoranda of their own within 14 days of the date of service of the Secretary's memorandum. (darl) [02-1679 02-1739]

9/15/03 SUPPLEMENTAL BRIEF filed by Amicus Curiae U.S. Department of Labor. Length: 24 pages, Copies: 7, delivered by mail. Certificate of service date 9/15/03. [02-1679] (darl) [02-1679]

3/10/04	CASE Reopened. [02-1679, 02-1739] (frnk) [02-1679 02-1739]
3/10/04	OPINION filed. Chief Judge Michael Boudin, Judge Juan R. Torruella and Judge Sandra L. Lynch. Signed Judge Juan R. Torruella, Authoring Judge. PUBLISHED. [846138-1] [02-1679, 02-1739] (frnk) [02-1679 02-1739]
3/10/04	JUDGMENT entered by Chief Judge Michael Boudin, Judge Juan R. Torruella and Judge Sandra L. Lynch. The time within which a petition for panel rehearing or suggestion for rehearing en banc must be submitted is extended to March 23, 2004. In accordance with our practice, it is not contemplated that mandate will issue unless circumstances arise which warrant such action. [846140-1] [02-1679, 02-1739] (frnk) [02-1679 02-1739]

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, *et al.*,	)
Plaintiffs	)
	)
v.	) CIVIL NO. 00-371-P-C
	)
BARBER FOODS, INC. d/b/a	) Entered on Docket on:
Barber Foods	) 5-3-02

JUDGMENT

In accordance with the parties' joint stipulation of dismissal reached during the final pretrial conference held on December 6, 2001 before Magistrate Judge David M. Cohen, judgment of dismissal is hereby entered as to plaintiffs Brad Reynolds, Scott Knox and Michael Smith.

In accordance with Judge Gene Carter's Order Affirming the Recommended Decision of the Magistrate Judge on Defendant's Motion for Sanctions dated February 20, 2002 (Pleading No. 48) and Judge Gene Carter's Order Affirming the Recommended Decision of the Magistrate Judge on Defendant's Motion for Summary Judgment dated February 20, 2002 (Pleading No. 49), judgment is hereby entered in favor of Barber Foods, Inc. d/b/a Barber Foods and against Gordon Lemire, Lisa Morgan, Tatyana Novika, Robert Ouellette, Mark Aitkenhead, Cory Chase, Toan Dang, William Devine, Angela Dumont, Mohammed Habibzai, Peter Hamilton, Diane Keraghan, Lee LeCroix, Gladstone Lewis and Kyra Perdue.

This action came on for trial before the Court and a jury, Honorable Gene Carter, District Judge, presiding, and the issues having been duly tried and the jury having rendered its verdict, judgment is hereby entered in favor of Barber Foods, Inc. d/b/a Barber Foods and against Nicholas

Bearce, Allison Carey, Celso Florendo, Letecheal Hailu, Robert Huntley, Ken LeMarche, Ernest Levesque, Natalie Luongo, Paul Mason, Derso Mekonen, The Ngo, Tadeusz Olsyzynski, Joseph Raymond, Doug Robito, Najib Sayed, Laurie Secord, Kevin Snow, Evelyn Theunissen, Abdela Tum, Heidi Wallace and Mintwab Yimam.

WILLIAM S. BROWNELL
Clerk

By: _____
Christa K. Berry
Deputy Clerk

Dated May 3, 2002.

**Handwriting omitted*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ABDELA TUM,	)
	)
NAJIB SAYED,	) **Case No._____**
	)
CELSO FLORENDO,	)
	)
and	) **COLLECTIVE ACTION**
	) **COMPLAINT**
TADEUSZ OLSZYNSKI,	) **FOR VIOLATIONS**
	) **OF FEDERAL**
on behalf of themselves and	) **WAGE-AND-HOUR**
	) **LAW**
all others similarly situated,	)
	)
Plaintiffs,	)
	) **AND DEMAND FOR**
vs.	) **JURY TRIAL**
	)
BARBER FOODS, INC.,	)
d/b/a BARBER FOODS,	)
	)
Defendant.	)
	)

COLLECTIVE ACTION COMPLAINT

Plaintiffs Abdela Turn, Najib Sayed. Celso Florendo, and Tadeusz Olszynski, (hereinafter collectively referred to as "Named Plaintiffs"), by and through their attorneys, allege for their Complaint as follows:

I. INTRODUCTION

1. Named Plaintiffs bring this action against Barber Foods, Inc., d/b/a Barber Foods ("Barber Foods") for legal relief to redress unlawful violations of the Named Plaintiffs' rights under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201, et seq., and specifically the [Page 2] collective action provision of the Act found § 2 16(b), to remedy violations of the wage provisions of the FLSA by Barber Foods, which have deprived the Named Plaintiffs, as well as others similarly situated to the Named Plaintiffs, of their lawful wages.

2. The Named Plaintiffs are current and former Barber Foods hourly employees who have worked at Barber Foods' poultry processing plants as non-exempt employees entitled to minimum wage, regular wage, and overtime pay under the FLSA. Named Plaintiffs allege, on behalf of themselves and all similarly-situated persons, that Barber Foods has willfully engaged in a pattern and practice of unlawful conduct by failing to record, credit, or compensate Barber Foods' non-exempt, hourly wage poultry processing employees, including the Named Plaintiffs and potential opt-in plaintiffs for all of the time Barber Foods requires or permits such employees to perform work.

3. Other current and former employees of Barber Foods are also entitled to receive unpaid wage and/or overtime compensation for the reasons alleged in this Complaint. The named Plaintiffs are permitted to maintain this action "for and on behalf of themselves and other employees similarly situated." 29 U.S.C. § 2 16(b). Any similarly-situated employee wishing to be the a party plaintiff to this action must provide "his consent in writing to become such a party," and such consent must be filed with this Court. 29 U.S.C. § 216(b). Written Consents to Become Party Plaintiff

for each of the four Named Plaintiffs are filed herewith as attachments to this Complaint.

4. Defendant's practices are in direct violation of the FLSA, 29 U.S.C. § 201 *et seq.* The Named Plaintiffs seek injunctive and declaratory relief, compensation, and credit for all unrecorded and uncompensated work required or permitted by Barber Foods, liquidated and/or [Page 3] damages as permitted by applicable law, and attorneys' fees and costs.

II. PRELIMINARY STATEMENT

5. This action is brought to recover unpaid hourly and overtime compensation owed to the Named Plaintiffs and all current and former employees of Defendant who are similarly situated to the Named Plaintiffs, pursuant to the FLSA. The Named Plaintiffs and the collective group similarly situated are or have been employed at the Barber Foods facility in Portland, Maine. The Named Plaintiffs and the collective group of similarly situated individuals include persons working for Barber Foods in positions such as, but not limited to, production line worker, machine operator, set-up operator, and housekeeper.

6. Barber Foods has engaged in the practice of requiring or permitting its hourly non-exempt poultry processing employees to perform work for the benefit of Barber Foods, but for which Barber Foods does not record, credit or compensate its non-exempt hourly employees.

7. Barber Foods' practice of requiring or permitting its hourly non-exempt employees to work off-the-clock is in violation of the FLSA, because such employees perform work for the benefit of Barber Foods which is uncompensated at their regular hourly wage. To the extent that such work is performed during a workweek in which the affected employees have, or would have, worked in excess of forty (40) hours per week, such practice further violates the overtime pay provisions of the FLSA by virtue of

Defendant's failure to pay compensation at a rate of one and one-half (1 ½) times the employees' regular hourly wage rate.

III. JURISDICTION AND VENUE

8. This Court has federal question jurisdiction over this action pursuant to 28 U.S.C. 1331; and Section 216(b) of the FLSA, 29 U.S.C. § 216(b). [Page 4]

9. Venue is proper in the District of Maine pursuant to 28 U.S.C. §1391(b) and (c). Barber Foods is licensed to do business and is doing business in Maine and may be found in the District of Maine. The acts complained of occurred in the District of Maine and gave rise to the claims alleged herein.

IV. PARTIES

A. NAMED PLAINTIFFS

10. Named Plaintiff Abdela Tum is resident of Portland, Maine. Turn has been employed by Barber Foods from approximately March 28, 1990, through the present. Tum has worked as an hourly wage employee in Barber Foods' Portland poultry processing plant as a production line worker and housekeeper. At all relevant times, Turn has been an employee of Barber Foods within the meaning of the FLSA.

11. Named Plaintiff Najib Sayed is resident of Portland, Maine. Sayed was employed by Barber Foods from 1995 until February 15, 2000. Sayed worked as an hourly wage employee in Barber Foods' Portland poultry processing plant as a line worker and housekeeper. At all relevant times, Sayed was an employee of Barber Foods within the meaning of the FLSA.

12. Named Plaintiff Celso Florendo is a resident of Portland, Maine. Florendo has been employed by Barber Foods from approximately July 14, 1994, through the present. Florendo has worked as an hourly wage employee in

Barber Foods' Portland poultry processing plant as a production line worker and a machine operator. At all relevant times, Florendo has been an employee of Barber Foods within the meaning of the FLSA.

13. Named Plaintiff Tadeusz Olszynski is a resident of Portland, Maine. Olszynski has been employed by Barber Foods from approximately October 1991, through the present. Olszynski [Page 5] has worked as an hourly wage employee in Barber Foods' Portland poultry processing plant as a machine set-up operator. At all relevant times, Olszynski has been an employee of Barber Foods within the meaning of the FLSA.

B. DEFENDANT

14. Defendant Barber Foods is a Maine corporation with its headquarters located in Portland, Maine. Barber Foods is a poultry processor with a facility in Portland, Maine. Barber Foods employs approximately 750 persons.

V. FACTUAL ALLEGATIONS APPLICABLE TO ALL CLAIMS

15. The poultry processing operations, general plant conditions, and wage and compensation policies and practices for all non-exempt hourly wage employees at Barber Foods' poultry processing plant are substantially similar, if not identical.

16. Barber Food's poultry processing plant is essentially an assembly-line operation. Chickens move through the facilities on various "Specialty Lines" where employees perform a discrete task on the chickens, such as packing the chicken parts into trays, smoothing the product, "switching" or arranging the product, and closing the product packages for shipment from the plant. On other Specialty Lines, the workers perform such tasks as wrapping pasty around chicken parts, and closing raw patties with stuffing.

Housekeepers perform tasks such as cleaning the floor and emptying trash. Machine Operators and Machine Set-up Operators prepare machines and the line to perform certain tasks and keep production line machines in operating order by making adjustments, transport chicken to the production lines, deposit chicken into formers, and operate the production machinery. Named Plaintiffs and potential opt-in plaintiffs all work or have worked in various positions on these lines. [Page 6]

18. Chicken processing is labor-intensive, dangerous and often unpleasant work. Regardless of the line on which they have worked or other positions they have held, the Named Plaintiffs and potential opt-in plaintiffs of the Collective Action must keep pace with a fast-moving conveyor belt while they use knives, scissors, or their hands to perform assigned tasks. Many sections of the plant are wet and slippery, and some sections are kept very cold to prevent damage to the poultry. In addition, as a poultry processor, Barber Foods must ensure that federal and other required sanitation standards are met and that the poultry products are not contaminated during processing.

19. As a result of these conditions and requirements, Named Plaintiffs and potential opt-in plaintiffs of the Collective Action are generally required to wear the following safety and sanitary equipment: (a) cotton liner gloves, because the plant is cold; (b) rubber outer gloves, which protect the employees' hands from nicks and cuts on the line and prevent contamination of the chicken; (c) a coat that protects the employees' clothing and prevents the product from being contaminated; (d) an inner vest for warmth; (e) plastic sleeves that protect the employees' arms from cuts, as well as their clothing; (f) earplugs, which prevent hearing damage; (g) safety glasses which protect employees' eyes; (h) a halt-net, to prevent contamination of the chicken; (i) a hat which protects employees' heads from injury as well as preventing contamination of the chicken; and (j) a special black belt, also for employee safety.

Machine operators and set-up operators are also required to wear steel-toed boots; they do not always wear the rubber gloves.

20. Barber Foods requires the Named Plaintiffs and potential opt-in plaintiffs of the Collective Action to arrive at work long before the beginning of their scheduled shift schedules to engage in certain activities for Barber Foods' benefit. Such activities include obtaining and putting [Page 7] on the required safety and sanitary clothing, equipment, and gear, and obtaining their tools. The employees must stand in a line to receive from a single window their allotment of clothing and equipment and gear, then proceed to a locker area to obtain other clothing and tools from lockers, put on the clothing, equipment, and gear, and then proceed to the cafeteria to wait to enter the production floor. The Named Plaintiffs and potential opt-in plaintiffs of the Collective Action also frequently receive instructions from supervisors regarding job assignments during this time. Such work activities typically consume thirty-five (35) minutes. The Named Plaintiffs and potential opt-in plaintiffs of the Collective Action are not permitted to clock in before entering the production floor and do not receive credit for, and are not compensated for, any of this extra, unpaid work performed for the benefit of Barber Foods. Barber Foods does not record, report, or maintain records of such unpaid work performed by the Named Plaintiffs and potential opt-in plaintiffs of the Collective Action.

21. Barber Foods requires the Named Plaintiffs and potential opt-in plaintiffs of the Collective Action to continue working through part or all of their unpaid lunch break because lunch time is the only practical opportunity for workers to use the bathroom. For sanitary reasons, the Named Plaintiffs and potential opt-in plaintiffs must remove their safety and sanitary equipment, clothing, and gear before entering the bathroom and then, still on unpaid break time, must put back on their safety and sanitary equipment, clothing, and gear prior to eating lunch and/or returning to

the line for work. Additionally, the Named Plaintiffs and potential opt-in plaintiffs of the Collective Action must often obtain, and put on, replacements for coats or gloves or other gear that are soiled and/or torn. The Named Plaintiffs and potential opt-in plaintiffs of the Collective Action do not receive credit for, and are not compensated for, any of this extra, unpaid work performed for [Page 8] the benefit of Barber Foods. Consequently, the Named Plaintiffs and potential opt-in plaintiffs typically receive only about twenty (20) minutes of actual break time. Barber Foods does not record, report, or maintain records of such unpaid work performed by the Named Plaintiffs and potential opt-in plaintiffs of the Collective Action.

22. The Named Plaintiffs and potential opt-in plaintiffs of the Collective Action occasionally require medical treatment or examination for illness or injury. On such occasions, they are sometimes ordered by supervisors to visit the plant nurse's office during their unpaid break time. The Named Plaintiffs and potential opt-in plaintiffs of the Collective Action do not receive credit for, and are not compensated for, any of this extra, unpaid work performed for the benefit of Barber Foods. Consequently, on such occasions the Named Plaintiffs and potential opt-in plaintiffs receive little or no actual break time for that day. Barber Foods does not report such unpaid work performed by the Named Plaintiffs and potential opt-in plaintiffs of the Collective Action.

23. At the end of their shifts, the Named Plaintiffs and the potential opt-in plaintiffs are required to remove their safety equipment, clothing, and gear, and to deposit it in their lockers, the laundry or other return bin, or the garbage. The Named Plaintiffs and potential opt-in plaintiffs are not compensated for this work time.

24. Barber Foods' supervisors know that Barber Foods employees perform work that is uncompensated. The supervisors observe the employees, and often direct them in, performing work for the benefit of Barber Foods during time that is not recorded by Barber Foods. In addition, the

supervisors determine which time worked by the employees will be paid by Barber Foods.

25. Barber Foods knew or should have known that its supervisory and management personnel permit or require Named Plaintiffs and potential opt-in plaintiffs of the Collective Action [Page 9] to perform work which is for the benefit of Barber Foods, and which is integral to Barber Foods' poultry processing business, without appropriate compensation, including time spent waiting in line to obtain safety and sanitary equipment and gear, putting on, taking off, exchanging, and discarding safety and sanitary equipment, clothing, and gear, reporting early and awaiting instructions for their job assignments, and seeing company medical personnel during their unpaid breaks.

26. Barber Foods has willfully engaged in a pattern and practice of unlawful conduct by declining to record and pay for all of the time it requires or permits its employees to work, in violation of the FLSA. Barber Foods' unlawful conduct has been repeated and consistent

27. The conduct of Barber Foods, set forth above, has been willful, in bad faith, and has caused significant damages to Named Plaintiffs and potential opt-in plaintiffs of the Collective Action.

VI. COLLECTIVE ACTION ALLEGATIONS

28. The Named Plaintiffs bring a Claim for Relief for violation of the FLSA as a collective action pursuant to Section 216(b) of the FLSA, 29 U.S.C. § 216(b), on behalf of all non- exempt hourly employees of Barber Foods who were, are or will be employed in Barber Foods' poultry processing plants during the period of three years prior to the date of commencement of this action through the date of judgment of this action, who have not been compensated at their regular rate of pay for time worked off-the-clock, or at one and one-half times the regular rate of pay for all work performed in excess of forty (40) hours per work week. The

Named Plaintiffs are putative members of the collective action on whose behalf all claims alleging violations of FLSA are brought.

29. A claim for relief for violations under the FLSA may be brought and maintained as an "opt-in" collective action pursuant to § 216(b) of FLSA, 29 U.S.C. § 216(b), for all claims [Page 10] asserted by the Named Plaintiffs, because the claims of the Named Plaintiffs are similar to the claims of the putative members of the Collective Action.

30. Potential opt-in members of the Collective Action are similarly situated to the Named Plaintiffs. They have substantially similar job requirements and pay provisions, and are subject to a common practice, policy or plan that requires or permits them to perform uncompensated work for the benefit of Barber Foods, some of which is in excess of forty (40) hours per workweek. All Named Plaintiffs and potential opt-in plaintiffs of the Collective Action work or have worked for Barber Foods as non-exempt hourly employees in Barber Foods' chicken processing plants. All Named Plaintiffs and potential opt-in plaintiffs of the Collective Action perform or have performed work "off-the-clock" for the benefit of Barber Foods. None of the Named Plaintiffs or potential opt-in plaintiffs of the Collective Action has been credited or compensated for their respective "off-the-clock" work performed for the benefit of Barber Foods. All Named Plaintiffs and potential opt-in plaintiffs of the Collective Action have suffered damages, including lost wages, and/or lost overtime compensation, resulting from Barber Foods' wrongful conduct. In addition, all Named Plaintiffs and potential opt-in plaintiffs of the Collective Action are entitled to injunctive relief, as permitted by law, because Barber Foods' violations of various federal statutes have harmed and are continuing to harm them.

31. Named Plaintiffs have retained counsel competent and experienced in complex collective actions and FLSA litigation.

32. Named Plaintiffs bring this action on behalf of

themselves and the proposed Collective Action on behalf of all similarly-situated employees, as follows: former employees of Barber Foods who have held non-exempt positions at any time during all or any part of the period [Page 11] beginning three years before the filing of this complaint to the present, and who have not been fully compensated at regular or overtime wage rates for all hours worked.

33. The hourly employees at Barber Foods have been subject to the unlawful practices alleged herein and, therefore, are similarly situated to the Named Plaintiffs in this Collective Action. Barber Foods has engaged in a pattern and practice of permitting or requiring Named Plaintiffs and potential opt-in plaintiffs of the Collective Action to work "off-the-clock" before "line time" began, after "line time" ended, and/or during unpaid breaks, for the benefit of Barber Foods and without appropriate compensation, in violation of the FLSA.

34. Barber Foods has engaged in a pattern and practice of failing to keep accurate records showing all hours worked by Named Plaintiffs and potential opt-in plaintiffs of the Collective Action, in violation of the FLSA.

35. Barber Foods has engaged in a pattern and practice of permitting or requiring Named Plaintiffs and potential opt-in plaintiffs of the Collective Action to work overtime in excess of 40 hours in a workweek without appropriate compensation, in violation of the FLSA.

36. Barber Foods has engaged in a pattern and practice of permitting or requiring Plaintiffs and potential opt-in plaintiffs of the Collective Action to perform work for the benefit of Barber Foods during unpaid breaks.

37. Barber Foods' conduct as alleged has been willful.

38. Named Plaintiffs and potential opt-in plaintiffs of the Collective Action are entitled to lost wages, liquidated damages and the other relief requested.

39. The claims of the Named Plaintiffs are similar to those of the potential opt-in plaintiffs, in that Named

Plaintiffs have been subjected to the same practices as the potential opt-in [Page 12] plaintiffs Collective Action, and Named Plaintiff's claims are based on the same legal theory as potential opt-in plaintiffs of the Collective Action.

40. Named Plaintiff's FLSA claims are maintainable as a Collective Action pursuant to Section 16(b) of the FLSA, 29 U.S.C. §216(b).

VII. INDIVIDUAL NAMED PLAINTIFF ALLEGATIONS

43. **Named Plaintiff Abdela Tum** has been employed by Barber Foods from approximately March 28, 1990, through the present. Tum has worked as an hourly employee as a production line worker, a machine set-up operator, and a housekeeper. In production, he performed tasks such as closing, smoothing, and packing the poultry product. As a machine set-up operator, Tum was responsible for operating, and making minor adjustments on, production machines, and related duties. As a housekeeper, Tum has cleaned up spilled chicken parts and plastic covering material off of the production floor, and performed related duties.

44. Tum has been required to wear various safety and sanitary equipment and gear for all of his job duties, including: two sets of gloves, coat, vest, plastic sleeves, earplugs, safety glasses, hairnet, a hat, and safety belt.

45. Before punching in on the time clock each day, Turn has had to obtain and put on this safety equipment and gear, all of which took a total of at least thirty-five (35) minutes. Tum also frequently has received job assignment instructions from supervisors during this time. Tum has not been compensated for any of these activities, which are integral and indispensable to Barber Foods' poultry processing business and relate to his principal employment duties.

46. After completing his work, Tum has had to remove and return, discard, or store his required safety and sanitary equipment and gear, which typically takes ten (10) minutes.

Tum has [Page 13] not been compensated for any of these activities, which are integral and indispensable to Barber Foods' poultry processing business and relate to his principal employment duties.

47. Tum is entitled to a thirty (30)-minute unpaid lunch break each day. Tum has been required to remove his required safety and sanitary equipment and gear before going to the restroom during his unpaid lunch break, and then to put the equipment and gear back on afterward. On some occasions, Tum has been required to obtain replacement clothing and/or gear during his unpaid lunch break. As a result, Tum has received only twenty (20) minutes of actual break time because he has performed ten (10) minutes of work that was integral and indispensable to Barber Foods' poultry processing business and related to his principal employment duties.

48. On occasions when Tum became ill or injured on the job, he has been required to see the company nurse during his unpaid break. As a result, he had little, if any, free time to eat lunch, rest, or use the bathroom. Tum has not been compensated for time spent seeing the nurse, which is integral and indispensable to Barber Foods' poultry processing business and related to his principal employment duties.

49. Tum's supervisors have known that he was not compensated for all work performed. Each day, they have seen him perform integral and indispensable tasks for the benefit of Barber Foods and determined the time worked for which Tum was to be compensated.

50. Tum has been compensated for approximately forty (40) hours per week. In total, Turn has been denied compensation, at the applicable overtime premium rate, for approximately fifty-five (55) minutes per day, or approximately 275 minutes (about 4.6 hours) per five-day workweek (proportionally more for occasional weekend work), on average, for work in excess of forty (40) hours per week. Tum also has not been compensated for an

undetermined amount of time [Page 14] spent seeing the company nurse during his unpaid break time.

51. **Named Plaintiff Najib Sayed** was employed by Barber Foods from approximately 1994 through February 15, 2000. Sayed worked as an hourly employee as a production line worker and a housekeeper. In production, he performed tasks such as closing, smoothing, packing, and palletizing the poultry product. As a housekeeper, Sayed cleaned up spilled chicken parts and plastic covering material off of the production floor and under the boxing machines, lifting boxes, emptying trash, and performed related duties.

52. Sayed was required to wear various safety and sanitary equipment and gear for all of his job duties, including: two sets of gloves, coat, vest, plastic sleeves, earplugs, safety glasses, hairnet, a hat, and safety belt.

53. Before punching in on the time clock each day, Sayed had to obtain and put on this safety equipment and gear, all of which took a total of at least thirty-five (35) minutes. Sayed also frequently received job assignment instructions from supervisors during this time. Sayed was not compensated for any of these activities, which are integral and indispensable to Barber Foods' poultry processing business and relate to his principal employment duties.

54. After completing his work, Sayed had to remove and return, discard, or store his required safety and sanitary equipment and gear, which typically took ten (10) minutes. Sayed was not compensated for any of these activities, which were integral and indispensable to Barber Foods' poultry processing business and related to his principal employment duties.

55. Sayed was entitled to a thirty (30) minute unpaid lunch break each day. Sayed was required to remove his required safety and sanitary equipment and gear before going to the restroom during his unpaid lunch break, and then to put the equipment and gear back on afterward. [Page 15] On some occasions, Sayed was required to obtain replacement clothing and/or gear during his unpaid lunch break. As a

result, Sayed received only twenty (20) minutes of actual break time because he performed ten (10) minutes of work that was integral and indispensable to Barber Foods' poultry processing business and related to his principal employment duties.

56. When Sayed became ill or injured on the job, he was required to see the nurse during his unpaid break. As a result, he had little, if any, free time to eat lunch, rest, or use the bathroom. Sayed was not compensated for time spent seeing the nurse, which is integral and indispensable to Barber Foods' poultry processing business and related to his principal employment duties.

57. Sayed's supervisors knew that he was not compensated for all work performed. Each day, they saw him perform integral and indispensable tasks for the benefit of Barber Foods and determined the time worked for which Sayed was to be compensated.

58. Sayed was compensated for approximately forty (40) hours per week. In total, Sayed was denied compensation, at the applicable overtime premium rate, for approximately fifty- five (55) minutes per day, or approximately 275 minutes (about 4.6 hours) per five-day workweek (proportionally more for occasional weekend work), on average, for work in excess of forty (40) hours per week. Sayed also was not compensated for an undetermined amount of time spent seeing the company nurse during his unpaid break time.

59. **Named Plaintiff Celso Florendo** has been employed by Barber Foods from approximately July 14, 1994, through the present. Florendo has worked as an hourly wage employee as a production line worker and a machine operator. In production, he performed tasks such as closing, smoothing, and packing the poultry product. As a machine operator, Florendo has been [Page 16] responsible for preparing the machine and line to perform certain tasks, and operating, and making minor adjustments on, production

machines, and related duties. On some occasions, Florendo has helped to pack poultry products.

60. Florendo has been required to wear various safety and sanitary equipment and gear for all of his job duties, including: two sets of gloves, coat, vest, plastic sleeves, earplugs, safety glasses, hairnet, a hat, steel-toed boots, and safety belt.

61. Before punching in on the time clock each day, Florendo has had to obtain and put on this safety equipment and gear and his tools, all of which took a total of at least thirty-five (35) minutes. Florendo has also frequently received job assignment instructions from supervisors during this time. Florendo has not been compensated for any of these activities, which are integral and indispensable to Barber Foods' poultry processing business and relate to his principal employment duties.

62. After completing his work, Florendo has had to remove and return, discard, or store his required safety and sanitary equipment and gear, which typically takes ten (10) minutes. Florendo has not been compensated for any of these activities, which are integral and indispensable to Barber Foods' poultry processing business and relate to his principal employment duties.

63. Florendo is entitled to a thirty (30) minute unpaid lunch break each day. Florendo has been required to remove his required safety and sanitary equipment and gear before going to the restroom during his unpaid lunch break, and then to put the equipment and gear back on afterward. On some occasions, Florendo has been required to obtain replacement clothing and/or gear during his unpaid lunch break. As a result, Florendo has received only twenty (20) minutes of actual break time because he has performed ten (10) minutes of work that was integral and [Page 17] indispensable to Barber Foods' poultry processing business and related to his principal employment duties.

64. Florendo's supervisors knew that he was not compensated for all work performed. Each day, they saw him

perform integral and indispensable tasks for the benefit of Barber Foods and determined the time worked for which Florendo was to be compensated.

65. Florendo has been compensated for approximately forty (40) hours per week. In total, Florendo has been denied compensation, at the applicable overtime premium rate, for approximately fifty-five (55) minutes per day, or approximately 275 minutes (about 4.6 hours) per five-day workweek (proportionally more for occasional weekend work), on average, for work in excess of forty (40) hours per week.

66. **Named Plaintiff Tadeusz Olszynski** has been employed by Barber Foods from approximately October 1991 through the present. Olszynski has worked as an hourly wage employee as a machine set-up operator. As a machine set-up operator, Olszynski has been responsible for preparing the machine and line to perform certain tasks, setting up, operating, making minor adjustments on, and cleaning production machines, and related duties.

67. Olszynski has been required to wear various safety and sanitary equipment and gear for all of his job duties, including: gloves, coat, vest, plastic sleeves, earplugs, safety glasses, hairnet, a hat, steel-toed boots, and safety belt.

68. Before punching in on the time clock each day, Olszynski has had to obtain and put on this safety equipment and gear, all of which took a total of at least thirty-five (35) minutes. Olszynski also frequently has received job assignment instructions from supervisors during this time. Olszynski has not been compensated for any of these activities, which are integral and indispensable [Page 18] to Barber Foods' poultry processing business and relate to his principal employment duties.

69. After completing his work, Olszynski has had to remove and return, discard, or store his required safety and sanitary equipment and gear, which typically takes ten (10) minutes. Olszynski has not been compensated for any of these activities, which are integral and indispensable to

Barber Foods' poultry processing business and relate to his principal employment duties.

70. Olszynski is entitled to a thirty (30) minute unpaid lunch break each day. Olszynski has been required to remove his required safety and sanitary equipment and gear before going to the restroom during his unpaid lunch break, and then to put the equipment and gear back on afterward. On some occasions, Olszynski has been required to obtain replacement clothing and/or gear during his unpaid lunch break. As a result, Olszynski has received only twenty (20) minutes of actual break time because he has performed ten (10) minutes of work that was integral and indispensable to Barber Foods' poultry processing business and related to his principal employment duties.

71. On occasions when Olszynski became ill or injured on the job, he has been required to see the company nurse during his unpaid break. As a result, he had little, if any, free time to eat lunch, rest, or use the bathroom. Olszynski has not been compensated for time spent seeing the nurse, which is integral and indispensable to Barber Foods' poultry processing business and related to his principal employment duties.

72. Olszynski's supervisors knew that he was not compensated for all work performed. Each day, they saw him perform integral and indispensable tasks for the benefit of Barber Foods and determined the time worked for which Olszynski was to be compensated.

73. Olszynski has been compensated for approximately forty (40) hours per week. In [Page 19] total, Olszynski has been denied compensation, at the applicable overtime premium rate, for approximately fifty-five (55) minutes per day, or approximately 275 minutes (about 4.6 hours) per five-day workweek (proportionally more for occasional weekend work), on average, for work in excess of forty (40) hours per week. Olszynski also has not been compensated for an undetermined amount of time spent seeing the company nurse during his unpaid break time.

VIII. FLSA CLAIMS

74. The Named Plaintiffs reallege and incorporate by reference the above paragraphs as if they were set forth again herein.

75. For the past 3 years, Barber Foods has willfully violated the FLSA by engaging in a pattern or practice, including the following:

(a) Failing to keep accurate records showing all the time it permitted or required Named Plaintiffs and potential opt-in plaintiffs of the Collective Action towork and perform integral and indispensable activities for the benefit of Barber Foods which has resulted in the denial of compensation, either at a regular rate or an overtime premium for all time worked in excess of forty (40) hours in a work week, as required by the FLSA; and

(b) Permitting or requiring Named Plaintiffs and potential opt-in plaintiffs of the Collective Action to work and perform integral and indispensable activities for the benefit of Barber Foods before the regular paid work shift without compensation at the applicable regular or overtime premium rates, as required by the FLSA; and

(c) Permitting or requiring Named Plaintiffs and potential opt-in plaintiffs of the [Page 20] Collective Action to work and perform integral and indispensable activities for the benefit of Barber Foods during unpaid breaks without compensation at the applicable regular or overtime premium rates, as required by the FLSA; and

(d) Permitting or requiring Named Plaintiffs and potential opt-in plaintiffs of the Collective Action to work and perform integral and indispensable activities for the benefit of Barber Foods after the regular paid work

shift without compensation at the applicable regular or overtime premium rates, as required by the FLSA.

IX. PRAYER FOR RELIEF

WHEREFORE, Named Plaintiffs, on behalf of themselves and all putative members of the proposed Collective Action, pray for relief as follows:

A. Awarding damages from Barber Foods for the Named Plaintiffs and potential opt-in plaintiffs of the Collective Action, including compensation for unrecorded work time, and liquidated and exemplary damages, in amounts to be proven at that
B. Awarding all costs of litigation, including expert fees and attorneys' fees.
C. Awarding such other legal and equitable relief as the Court deems proper.

X. JURY DEMAND

92. Plaintiffs further demand a jury to try all issues triable as of right to jury, who joined. [Page 21]

Respectfully submitted this 12th day of December, 2000.

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UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM,	)	
NAJIB SAYED,	)	
CELSO FLORENDO and	)	
TADEUSZ OLSZYNSKI,	)	
	)	
Plaintiffs,	)	CIVIL NO.CV-00-371-P-C
	)	
v.	)	
	)	
BARBER FOODS,	)	
	)	
Defendant.	)	

ANSWER

I. INTRODUCTION

1. Barber Foods denies any violation of the Fair Labor Standards Act, but admits that Plaintiffs are bringing this action pursuant to the FLSA.

2. Barber Foods admits that Plaintiffs are current and former employees and are nonexempt employees, but denies the remaining allegations of Paragraph 2.

3. Barber Foods denies that any current or former employees are entitled to receive unpaid wages or overtime compensation. The remaining allegations are legal assertions which require no response.

4. Barber Foods denies that its practices are in violation of the FLSA.

II. PRELIMINARY STATEMENT

5. Barber Foods denies that the named plaintiffs are "similarly situated" to all of its employees in the listed job positions. [Page 2]

6. Barber Foods denies the allegations of Paragraph 6.

7. Barber Foods denies the allegations of Paragraph 7.

III. JURISDICTION AND VENUE

8. Barber Foods admits the allegations of Paragraph 8.

9. Barber Foods admits the allegations of Paragraph 9.

IV. PARTIES

A. NAMED PLAINTIFFS

10. Barber Foods admits the allegations of Paragraph 10.

11. With the exception that Mr. Sayed was initially hired in 1993, Barber Foods admits to the allegations of Paragraph 11.

12. With the exception that Mr. Florendo was hired on July 18, 1994, Barber Foods admits the allegations of Paragraph 12.

13. With the exception that Mr. Olszynski was hired on September 16, 1991, Barber Foods admits the allegations of Paragraph 13.

B. DEFENDANT

14. Barber Foods admits the allegations of Paragraph 14.

V. FACTUAL ALLEGATIONS APPLICABLE TO ALL CLAIMS

15. Barber Foods denies the allegations of Paragraph 15.

16. Barber Foods admits the allegations of Paragraph 16. [Page 3]

18 (sic). Barber Foods denies Plaintiffs' characterizations of the work as "dangerous" and "often unpleasant" and that "many" sections of the plant are "slippery", but otherwise admits the allegations of Paragraph 18.

19. Barber Foods admits the allegations of Paragraph 19.

20. Barber Foods denies the allegations of Paragraph 20.

21. Barber Foods denies the allegations of Paragraph 21.

22. Barber Foods admits that Plaintiffs occasionally require medical treatment or examination, but denies the remaining allegations of Paragraph 22.

23. Barber Foods admits the allegations of Paragraph 23, but denies that the described activities constitute work time.

24. Barber Foods denies the allegations of Paragraph 24.

25. Barber Foods denies the allegations of Paragraph 25.

26. Barber Foods denies the allegations of Paragraph 26.

27. Barber Foods denies the allegations of Paragraph 27.

VI. COLLECTIVE ACTION ALLEGATIONS

28. The allegations of this paragraph are legal assertions which do not require a response.

29. Barber Foods denies the allegations of Paragraph 29.

30. Barber Foods denies the allegations of Paragraph 30.

31. Barber Foods is without knowledge sufficient to form a belief as to the truth of the allegations of Paragraph 21. [Page 4]

32. The allegations of this paragraph are legal assertions which do not require a response.

33. Barber Foods denies the allegations of Paragraph 33.

34. Barber Foods denies the allegations of Paragraph 34.

35. Barber Foods denies the allegations of Paragraph 35.

36. Barber Foods denies the allegations of Paragraph 36.

37. Barber Foods denies the allegations of Paragraph 37.

38. Barber Foods denies the allegations of Paragraph 38.

39. Barber Foods denies the allegations of Paragraph 39.

40. Barber Foods denies the allegations of Paragraph 40.

VII. INDIVIDUAL NAMED PLAINTIFF ALLEGATIONS

43.(sic) Barber Foods admits the allegations of Paragraph 43.

44. Barber Foods admits the allegations of Paragraph 44.

45. Barber Foods admits that Tum has not been compensated for preliminary activities, but denies the remaining allegations of Paragraph 45.

46. Barber Foods admits that Tum has not been compensated for postliminary activities, but denies the remaining allegations of Paragraph 46.

47. Barber Foods admits that employees have an unpaid 30-minute lunch break and must remove sanitary equipment before using the restroom, but denies the remaining allegations of Paragraph 47.

48. Barber Foods denies the allegations of Paragraph 48. [Page 5]

49. Barber Foods denies the allegations of Paragraph 49.

50. Barber Foods denies the allegations of Paragraph 50.

51. With the exception that Mr. Sayed was originally hired in 1993, Barber Foods admits the allegations of Paragraph 51.

52. Barber Foods admits the allegations of Paragraph 52.

53. Barber Foods admits that Sayed has not been compensated for preliminary activities, but denies the remaining allegations of Paragraph 53.

54. Barber Foods admits that Sayed has not been compensated for postliminary activities, but denies the remaining allegations of Paragraph 54.

55. Barber Foods admits that employees have an unpaid 30-minute lunch break and must remove sanitary equipment before using the restroom, but denies the remaining allegations of Paragraph 55.

56. Barber Foods denies the allegations of Paragraph 56.

57. Barber Foods denies the allegations of Paragraph 57.

58. Barber Foods denies the allegations of Paragraph 58.

59. With the exception that Mr. Florendo was hired on July 18, 1994, Barber Foods admits the allegations of Paragraph 59.

60. Barber Foods admits the allegations of Paragraph 60.

61. Barber Foods admits that Florendo has not been compensated for preliminary activities, but denies the remaining allegations of Paragraph 61. [Page 6]

62. Barber Foods admits that Florendo has not been compensated for postliminary activities, but denies the remaining allegations of Paragraph 62.

63. Barber Foods admits that employees have an unpaid 30-minute lunch break and must remove sanitary equipment before using the restroom, but denies the remaining allegations of Paragraph 63.

64. Barber Foods denies the allegations of Paragraph 64.

65. Barber Foods denies the allegations of Paragraph 65.

66. With the exception that Mr. Olszynski has been employed by Barber Foods since September 16, 1991, Barber Foods admits the allegations of Paragraph 66.

67. Barber Foods admits the allegations of Paragraph 67.

68. Barber Foods admits that Olszynski has not been compensated for preliminary activities, but denies the remaining allegations of Paragraph 68.

69. Barber Foods admits that Olszynski has not been compensated for postliminary activities, but denies the remaining allegations of Paragraph 69.

70. Barber Foods admits that employees have an unpaid 30-minute lunch break and must remove sanitary equipment before using the restroom, but denies the remaining allegations of paragraph 70.

71. Barber Foods denies the allegations of Paragraph 71.

72. Barber Foods denies the allegations of Paragraph 72.

73. Barber Foods denies the allegations of Paragraph 73. [Page 7]

VIII. FLSA CLAIMS

74. Barber Foods repeats and realleges its responses to the allegations of Paragraphs 1 through 73 above as if fully set forth herein.

75. Barber Foods denies the allegations of Paragraph 75(a) - 75(d).

AFFIRMATIVE DEFENSES

1. The activities for which Plaintiffs seek compensation are preliminary and postliminary activities for which no compensation is due pursuant to 29 U.S.C. § 254(a).

2. Any claims for damages for the period preceding two years from the commencement of the action are barred by the limitations period set forth in 29 U.S.C. § 255(a), because any alleged violations by Barber Foods were not willful.

3. Barber Foods is not liable for liquidated damages because its actions were in good faith and with reasonable grounds to believe that it was not violating any provisions of the FLSA. 29 U.S.C. § 260.

4. Any alleged work time for which Plaintiffs have not been compensated is of such a small amount that any such time is not compensable under the *de minimus* doctrine.

WHEREFORE, Barber Foods requests judgment in its favor and that it be awarded its costs.

Dated: January 4, 2001.

_____

Graydon G. Stevens
Attorney for Defendant

KELLY, REMMEL & ZIMMERMAN
53 Exchange Street
P.O. Box 597
Portland, Maine 04112
Handwriting omitted

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, et al,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL NO.CV-00-371-P-C
	)	
BARBER FOODS,	)	
	)	
Defendant.	)	

BARBER FOODS' STATEMENT OF MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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[page2]STATEMENT OF FACTS

1. BARBER FOODS - GENERAL

1.1. Barber Foods is a further processor of poultry-based, center-of-the-plate products. Its production facilities are located at one site in Portland.[1]

1.2. Barber Foods has two production shifts. Both shifts have six lines - three specialty lines and three pack-out lines. The specialty lines are where the product - Chicken Kiev, Chicken Cordon Bleu, etc. - is assembled. After moving through the specialty lines, the finished product moves into large spiral freezers. The product comes out the other side of the freezers onto pack-out lines where it is pouched, packed and palletized.[2]

1.3. The production lines are staffed primarily by what Barber Foods calls rotating associates (the associates generally rotate to different positions on the lines every two hours). The rotating associates are the largest classification of associates at Barber Foods. There are 149 rotating associates on each shift. This number has not changed significantly in the last three years.[3]

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[1] Bickford Affidavit, ¶ 2.
[2] Bickford Affidavit, ¶ 3.
[3] Bickford Affidavit, ¶ 4.

1.4. In addition to rotating associates, each line has set-up operators whose primary duties are to make sure that the various machines on the lines are operating [page 2] smoothly. The specialty lines have a forming machine which forms the basic product, e.g. chicken fingers, nuggets, or patties for a stuffed product, a stuffing machine, and a breading machine. The pack-out lines have a poucher, a boxer, and a taper. The set-up operators set the machines up for the particular product being run, making adjustments as directed to things such as temperature, speed, resupply, thickening batter, correcting jambs, etc. The set-up operators are the second largest classification of associates at Barber Foods. There are 34 set-up operators on each shift. This number has not changed significantly in the last three years.[4]

1.5. Barber Foods has no slaughtering, butchering, or deboning operations. It purchases boneless chicken breast in bulk. The chicken breast is prepared for the production lines in the meatroom, where the raw product is thawed, ground, blended with ingredients, and put into formula for the various products.[5]

2. THE PLAINTIFFS

2.1. There are 44 plaintiffs - 7 present associates and 37 former associates. The plaintiffs fall within the following six job classifications:[6]

Rotating Associates
Set-up Operators
Meatroom
Shipping & Receiving
Maintenance

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[4] Bickford Affidavit, ¶ 5.
[5] Bickford Affidavit, ¶ 6.
[6] Bickford Affidavit, ¶ 7.

- Sanitation [page 3]

2.2. Exhibit 1 is a list of the plaintiffs by job classification, with dates of emp! ment and shift.[7]

3. SHIFT SCHEDULES

3.1. Barber Foods has three shifts. The first two shifts are production shifts and the third shift is for the sanitation crew. The shift schedules are:[8]

First:	6:30 a.m. - 3:00 p.m.
Second:	3:45 p.m. - 12:15 a.m.
Third:	11:30 p.m. - 6:30 a.m.

3.2. Associates in different job classifications start at varying times prior to the general production shift start. The start times for the job classifications relevant to this case are as follows:[9]

First Shift

Set-up Operators:	5:00 a.m.
Maintenance:	5:00 a.m.
Meatroom:	5:00/5:30 a.m.
Shipping & Receiving:	5:45/6:15 a.m.
Rotating Associates:	6:30 a.m.

Second Shift

Meatroom:	2:00 p.m.
Maintenance:	3:00 p.m.
Set-up Operators:	3:15 p.m.
Shipping & Receiving:	3:15 p.m.
Rotating Associates:	3:45 p.m. [page 4]

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[7] Bickford Affidavit, ¶ 8.
[8] Bickford Affidavit, ¶ 9.
[9] Bickford Affidavit, ¶ 10.

Third Shift

Sanitation: 11:30 p.m.

3.3. Associates are expected to be on the production floor ready to work when their shift commences. However, with some variation by job classification, there is generally a twelve minute buffer period at the start of the shift whereby associates are allowed to punch in up to six minutes early and may also punch in up to six minutes late without being deemed tardy; e.g., a rotating associate on the first shift may punch in between 6:24 a.m. and 6:36 a.m. Associates are paid from the time they actually punch in, although they may be subject to counseling and/or disciplinary action at their crew lead's discretion if they do not punch in within the twelve minute buffer period.[10]

4. BREAKS

4.1. Associates are given two paid breaks, 15 minutes in the first half of the shift and 10 minutes in the second half. In each break they are given an extra 5 minutes to get to and from the production floor to the cafeteria/break area, so the actual paid time away from production is actually 20 minutes and 15 minutes, respectively.[11]

4.2. Associates are given a 30 minute unpaid meal break in the middle of the shift. They are also given an extra five minutes with this break to get to and from the [page 5] production floor to the cafeteria/break area, so the actual time away from production is 35 minutes, 5 paid and 30 unpaid.[12]

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[10] Bickford Affidavit, ¶ 11.
[11] Bickford Affidavit, ¶ 12; Whittier Deposition: 56.2-57.4, 58.17-59.12.
[12] Bickford Affidavit, ¶ 13; Whittier Deposition: 56.2-57.4, 58.17-59.12.

4.3. Associates may leave the premises during their breaks. They must remove their lab coat before leaving the plant.[13]

4.4. Sanitation associates on the third shift are paid from punch-in to punch-out, with no deduction for an unpaid meal break.[14]

5. SANITARY/SAFETY CLOTHING/EQUIPMENT - GENERAL

5.1. All associates are required to have on the following sanitary and/or safety clothing or equipment before entering the production floor: lab coat, hairnet, beardnet (if applicable) and earplugs. Since October 15, 2001, Barber Foods has also required all associates on the production floor to wear safety glasses. Before October 15, only certain positions or tasks required safety glasses.[15]

5.2. In addition to the lab coat, hairnet/beardnet, earplugs, and safety glasses required by every associate entering the production floor, there are other items of clothing or equipment worn by some [page 6] associates for safety, sanitary, or comfort purposes. Depending upon job classification, assignment, and personal preference, some combination of the following may be worn: vinyl gloves, cotton glove liners, vinyl aprons, sleeve covers, bump hats, back belt, steel-toed boots.[16]

5.3. Lab coats and cotton glove liners are available to the associates in the hallway between the cafeteria and the

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[13] Bickford Affidavit, ¶ 14.
[14] Bragg Affidavit, ¶ 7.
[15] Whittier Affidavit, ¶ 2.
[16] Whittier Affidavit, ¶ 3.

equipment cage. The lab coats are on hanger racks and the cotton glove liners are in tubs separated by size.[17]

5.4. Hairnets, beardnets, earplugs, vinyl gloves, sleeve covers, and aprons are dispensed from the window of the equipment cage.[18]

5.5 Vinyl gloves, sleeve covers, and aprons are also available from tubs on the production floor. Associates may obtain these items from the window or the tubs, at their option. Most associates obtain sleeve covers and aprons, if they choose to wear them, from the tubs on the production floor.[19]

5.6. Before August 3, 1999, hairnets/beardnets, earplugs, vinyl gloves, sleeve covers, and aprons, along with lab coats and cotton glove liners, were available to associates from racks and tubs in the cafeteria. Since August 3, 1999 these items, with the exception of the lab coats and glove liners, have been dispensed from the cage.[20] [page 7]

5.7. The cage is open continuously from 5:00 a.m. - 1:00 a.m. It is staffed by one associate, with a second assistant from 5:30 a.m. - 7:30 a.m. and 1:30 p.m. - 4:00 p.m.[21]

5.8. There are male and female locker rooms and all associates are offered the use of a locker. Associates may use their lockers at their option to store reusable clothing or equipment such as safety glasses, bump hat, back belt, safety boots, and for personal belongings or clothing.[22]

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[17] Whittier Affidavit, ¶ 4.
[18] Whittier Affidavit, ¶ 5.
[19] Whittier Affidavit, ¶ 6.
[20] Whittier Affidavit, ¶ 7.
[21] Whittier Affidavit, ¶ 8.
[22] Whittier Affidavit, ¶ 9.

6. SANITARY/SAFETY CLOTHING/EQUIPMENT - BY JOB CLASSIFICATION

The required clothing/equipment in each relevant job classification are:

6.1. Rotating Associates[23]

- Lab coat
- Hairnet/beardnet
- Earplugs
- Safety glasses

6.2. Set-up Operators[24]

- Lab coat
- Hairnet
- Earplugs
- Safety glasses
- Steel-toed boots
- Bump hat
- Back belt [page 8]
- LOTO (lock out/tag out)

6.3. Meatroom[25]

- Lab coat
- Hairnet/beardnet
- Earplugs
- Safety glasses
- Gloves (vinyl)
- Apron (heavier-weight vinyl)

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[23] Smith Affidavit, ¶ 2.
[24] Ive Affidavit, ¶ 2.
[25] Goodwin Affidavit, ¶ 2.

- Sleeve covers (heavier-weight vinyl)
- Rubber steel-toed boots
- Back belt
- LOTO

6.4. Shipping & Receiving[26]

- Safety glasses
- Steel-toed boots
- Bump hat/hard hat

Lab coat, hairnet/beardnet, and earplugs are required whenever enter the production floor. Freezer-wear required when enter freezer.

6.5. Maintenance[27]

- Safety glasses
- Steel-toed boots
- LOTO

Lab coat, hairnet/beardnet, and earplugs are required whenever enter the production floor. Specific safety equipment, e.g., welding mask, required depending [page 9] upon task being performed.

6.6. Sanitation[28]

- Lab coat
- hairnet/beardnet
- Earplugs
- Safety glasses
- Gloves

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[26] Scanlin Affidavit, ¶ 2.
[27] Shaw Deposition: 11.3-11.24, 12.19-13.9, 19.14-19.20, 20.1-20.17.
[28] Bragg Affidavit, ¶ 2.

- Rain pants
- Rubber steel-toed boots
- Bump cap
- Hose nozzle
- LOTO
- Tool clip (with 3 wrenches)(Level 2 associates)

7. SANITARY/SAFETY CLOTHING/EQUIPMENT - POST-SHIFT DISPOSAL

7.1. Lab coats and cotton glove liners are laundered and reused. Laundry bins are located at several locations along the hallway from the production floor exits to the plant exits and associates drop the coats and liners in these bins on their way out of the plant.[29]

7.2. Vinyl gloves, sleeve covers, and aprons are disposable. Trash bins are located on the production floor and along the hallway from the production floor exits to [page 10] the plant exits. These items may be removed and deposited in the trash bins on the production floor before punching out if the associate chooses.[30]

7.3. Bump hats, back belts, safety glasses, steel toed safety boots, and reusable earplugs are retained by associates and may be stored in their locker, in their vehicle, or taken home, at their option.[31] Most associates issued steel-toed boots wear them home.[32]

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[29] Page Affidavit, ¶ 2.
[30] Page Affidavit, ¶ 3.
[31] Page Affidavit, ¶ 4.
[32] Page Affidavit, ¶ 4.

8. TIME KEEPING PRACTICES

8.1. Barber Foods utilizes a computerized time-keeping system. Each associate has a swipe card with a bar code. The system downloads clock punches into the payroll software.[33]

8.2. Time clocks are located at the entrances/exits to the production floor and at the various production areas, such as packout 1, specialty 2, meatroom, etc.[34]

8.3. Rotating associates, set-up operators, and meatroom associates generally punch in at a clock in the area where they will be working and punch out on the "out" clocks which are located next to the two primary entrances/exits.[35] Maintenance [page 11] associates punch in and out on their own time clock in the maintenance room.[36] Shipping and receiving associates punch in and out on the plant office clock located by the shipping and receiving office.[37] Sanitation associates punch in on the cafeteria clock and punch out on one of the "out" clocks on the production floor.[38]

8.4. Associates are paid from punch in to punch out. The system automatically deducts ½ hour for the unpaid meal break, with the exception of sanitation associates who are paid from punch in to punch out and are paid through their meal break.[39]

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[33] Bickford Affidavit, ¶ 15.
[34] Bickford Affidavit, ¶ 16.
[35] Smith Affidavit, ¶ 3; Ive Affidavit, ¶ 3; Goodwin Affidavit, ¶¶ 3-4; Page Deposition: 99.16-100.5.
[36] Shaw Deposition: 25.5-25.7, 25.22-25.24.
[37] Scanlin Affidavit, ¶¶ 3-4.
[38] Bragg Affidavit, ¶¶ 3, 5.
[39] Bickford Affidavit, ¶ 17.

9. PLANT LAYOUT

9.1. Exhibit 2 consists of drawings of the production floor and lower level with the production areas, entrances/exits, time clocks, equipment cage and other referenced locations identified and highlighted, and approximate distances given.[40]

10. PRE-SHIFT/POST SHIFT ACTIVITIES

10.1. There is no specific "assembly line" arrival process. Some associates grab their lab coats and glove liners, go to the cage, and then to their lockers; others go to their lockers, then back to the cage. Some associates stop and socialize in the cafeteria before picking up anything, others go to the cage and/or lockers and then back to the cafeteria. [page 12] Some do not socialize, but simply pick up their stuff and proceed directly to the production floor with the required clothing and equipment ready to work when the shift starts.[41]

10.2. Depending upon the route taken, the actual walking time from entering the plant to arriving at the time clock where the associate punches in may be from 1-3 minutes.[42]

10.3. During busier times, there occasionally may be small lines at the coat racks and glove liner bins, at the cage window, or at the time clocks. During these times, an associate occasionally may have to wait, usually less than a minute, to obtain a coat and glove liners, or to obtain items

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[40] Bickford Affidavit, ¶ 18.
[41] Page Affidavit, ¶ 5.
[42] Page Affidavit, ¶ 6.

from the cage, or to punch in. Most often, there are no lines and it takes only a few seconds each to grab a coat and glove liners, get a hairnet and gloves from the cage, and to punch in.[43]

10.4. Generally, depending upon job classification, time of day, and personal preference, it can take from 1-5 minutes from entering the plant to punching in at the appropriate time clock, including walking time, waiting time, obtaining clothing or equipment, and donning of clothing or equipment.[44] [page 13]

ROTATING ASSOCIATES

10.5. Associates punch in on the production floor on time clocks in their production area. Lab coats, hairnets, and earplugs must be on before entering the floor. Gloves, aprons, and sleeve covers are optional. Most associates wear gloves. Aprons and sleeve covers are worn by most associates on the specialty lines, infrequently on the packout lines.[45]

10.6. Exclusive of walking time and waiting time, it may take ½-1 minute to don a lab coat and a few seconds each to don a hairnet and earplugs before punching in. Hairnets and earplugs are often donned while walking to the floor. Gloves are generally donned after punching in. Aprons and sleeve covers, if the associate chooses to wear them, are usually obtained from tubs on the floor and donned after punching in.[46]

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[43] Smith Affidavit, ¶ 7; Page Deposition: 71.8-71.17, 88.8-88.25; Whittier Deposition: 37.5-37.10; Lamphier Deposition: 31.12-31.15, 34.12-34.25, 80.1-80.6; Bickford Deposition: 72.2-74.10.

[44] Whittier Deposition: 12.16-12.23, 31.7-31.23.

[45] Smith Affidavit, ¶ 3.

[46] Smith Affidavit, ¶ 4.

10.7. At the end of the shift, vinyl gloves, aprons and sleeve covers are usually doffed and thrown in the trash bins on the production floor before punching out. After punching out, hairnets, earplugs, safety glasses, and gloves take seconds to doff and are usually doffed while walking. Doffing the lab coat may take 30 seconds. The hairnet is thrown in trash bins located in the hallway and lab coat and glove liners thrown in laundry bins while the associate is walking out of the plant.[47][page 14]

SET-UP OPERATORS

10.8. Associates don the required equipment and then punch in on the production floor on time clocks in their production area. It takes approximately 3 minutes to don everything if they did not wear their steel-toed boots from home.[48]

10.9. Prior to punching out, associates return to the cage any items they had checked out earlier in connection with the machines they were operating that day, such as cook code numbers and metal detection sticks. These are small items that can easily be held in one hand or in the pocket of the lab coat. It may take up to 1 minute to return these items to the cage.[49]

10.10. After punching out at the end of the shift, associates deposit lab coat, gloves, and hairnet in the laundry and trash bins on the way out. Safety glasses, bump hat, steel-toed boots, and LOTO are stored in their lockers or

[47] Smith Affidavit, ¶ 5.
[48] Ive Affidavit, ¶ 3.
[49] Ive Affidavit, ¶ 4.

taken home. It takes less than 3 minutes to doff all equipment.[50]

MEATROOM

10.11. Associates don the required equipment and punch in at the meatroom clock. It takes approximately 3 minutes to don the required clothing and equipment.[51] [page 15]

10.12. At the end of the shift, the associates wash their boots if necessary and then punch out at one of the "out" clocks by the exits. They deposit lab coat, gloves, hairnet, sleeve covers, and aprons in the laundry and trash bins. Gloves, aprons, and sleeve covers may be, and usually are, deposited in the trash before punching out. Remaining items are stored in the locker or taken home. It takes less than 3 minutes to doff all equipment after punching out.[52]

SHIPPING AND RECEIVING

10.13. Associates go to the shipping office and don lab coat, hairnet, and earplugs before entering production floor to punch in at the plant office clock. It takes a minute or less to don this equipment. After punching in, they return to the shipping office to doff the lab coat, hairnet, and earplugs and go to their assigned area, unless they are going directly to work on the production floor or freezer from the time clock.[53]

10.14. At the end of the shift, they must again don lab coat, hairnet, and earplugs before entering the production

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[50] Ive Affidavit, ¶ 5.
[51] Goodwin Affidavit, ¶ 3.
[52] Goodwin Affidavit, ¶ 4.
[53] Scanlin Affidavit, ¶ 3.

floor to punch out at the plant office clock. After punching out, they leave their white coat in the shipping office, drop the hairnet and earplugs in the trash, and leave the plant. It takes less than 1 minute to doff the coat, hairnet, and earplugs after punching out.[54][page 16]

MAINTENANCE

10.15. Maintenance associates have their own time clock in the maintenance department.[55] Associates generally pick up a lab coat from a room off the hallway immediately after entering the plant and then proceed directly to the maintenance room to punch in. Any required clothing or equipment is put on after punching in. Associates may come in and go directly to maintenance to punch in before getting their lab coat, but most associates grab their coat on the way to the maintenance room for convenience purposes.[56]

10.16. At the end of the shift, associates doff all equipment and deposit it in the trash or store it in their lockers before punching out. The lab coat is dropped in a laundry bin on the way out.[57]

SANITATION

10.17. Associates punch in on the cafeteria clock. They may punch in between 11:20 p.m. - 11:36 p.m. There is a nightly meeting in the cafeteria at 11:35 p.m. After the meeting, the associates go upstairs to work at 11:45 p.m.[58][page 17]

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[54] Scanlin Affidavit, ¶ 4.
[55] Shaw Deposition: 25.5-25.7, 25.22-25.24.
[56] Shaw Deposition: 22.1-22.24, 25.1-25.7, 25.25-27.11, 28.19-28.24, 29.22-30.5.
[57] Shaw Deposition: 30.6-32.10.
[58] Bragg Affidavit, ¶ 3.

10.18. Associates are paid to get ready. The general practice is to punch in at the cafeteria and then get one's clothing and equipment and report back to the cafeteria for the 11:35 p.m. meeting. Associates may obtain and don their clothing and equipment before going to the cafeteria to punch in if they wish, but this would be at their option, it is not required. If an associate is running late, he/she will punch in when he/she arrives for the meeting and then get dressed after the meeting before going upstairs.[59]

10.19. At the end of the shift, the associates wash their rain pants and tools while on the clock and then punch out at the plant office clock. They then go down the stairs, deposit their lab coats and glove liners in the laundry bins, their hairnets, gloves and other disposables in the trash bins, and their rain pants, boots and other reusable items in their lockers.[60]

10.20. Depending upon the associate, it usually takes from 2-4 minutes to put on all required equipment pre-shift and slightly less time to take it off and deposit it in the laundry and trash bins and in the lockers post-shift. Much of it is done while walking.[61]

11. MEAL BREAKS

11.1. Associates are free to do anything they wish, including leaving the premises, during their unpaid break.[62][page 18]

11.2. Lab coats must be removed if an associate leaves the premises. Lab coats, gloves, aprons, and sleeve

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[59] Bragg Affidavit, ¶ 4.
[60] Bragg Affidavit, ¶ 5.
[61] Bragg Affidavit, ¶ 6.
[62] Bickford Affidavit, ¶ 19.

covers must be removed if the associate uses the bathroom.[63] Most associates, if they are wearing aprons or sleeve covers, will throw them away when they take them off and will obtain new ones from tubs on the production floor after returning from break.[64]

12. MEDICAL APPOINTMENTS

12.1. Barber Foods has a medical office which is staffed by a nurse from 6:00 a.m. - 6:30 p.m., Monday - Friday, and also by a physician from 2:00 p.m. - 5:00 p.m., Tuesdays and Thursdays.[65]

12.2. Initial appointments are made by an associate's crew lead. This is done electronically. The nurse posts the appointment times in half-hour increments on the computer and if an associate needs to visit the office on other than an emergency basis, the crew lead checks the available appointment times on the computer and generally tries to schedule the associate for the next available slot.[66]

12.3. Appointments are always scheduled during an associate's shift if possible. Associates are paid for visiting the medical office.[67] [page 19]

12.4. Appointments cannot be scheduled during an associate's meal break on the second and third shifts because the medical office is not staffed when those meal breaks occur. On the first shift, medical appointments are not scheduled during an associate's unpaid meal break. If it happens because this was the only available slot, the

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[63] Whittier Affidavit, ¶ 10.
[64] Whittier Affidavit, ¶ 10.
[65] Bickford Affidavit, ¶ 20.
[66] Bickford Affidavit, ¶ 21.
[67] Bickford Affidavit, ¶ 22.

employee is paid for the time and allowed to take his or her entire meal break before or after the appointment.[68]

12.5. Barber Foods is not aware of any situation where an associate was required to visit the medical office during a meal break, not paid for that time, and not allowed to make up the entire break. If this did happen, it would be contrary to Barber Food's policies.[69]

FACTS RELEVANT TO STATUTE OF LIMITATIONS

13.1. Barber Foods was not aware and is not aware that its policies concerning pre-shift and post-shift activities, meal breaks, and medical appointments complained of by the plaintiffs failed to comply with the Fair Labor Standards Act.[70]

13.2. Peter Bickford, Barber Foods' Human Resources Business Partner, is primarily responsible for monitoring FLSA compliance. Mr. Bickford attends annual [page 20] seminars on labor and employment issues, including segments on wage and hour issues, and subscribes to numerous periodicals, including trade magazines, human resources managers' newsletters, Maine Employment Law Letter, and Maine Business & Employment Law, all of which deal regularly with current issues under the FLSA. Mr. Bickford is not aware of anything he has learned or received through those seminars or periodicals which indicates that

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[68] Bickford Affidavit, ¶ 23; Smith Affidavit, ¶ 6; Ive Affidavit, ¶ 6; Goodwin Affidavit, ¶ 5; Scanlin Affidavit, ¶ 5; Page Deposition: 102.2-103.14, 115.10-115.13; Whittier Deposition: 113.17-115.2.

[69] Bickford Affidavit, ¶ 24; Smith Affidavit, ¶ 6; Ive Affidavit, ¶ 6; Goodwin Affidavit, ¶ 5; Scanlin Affidavit, ¶ 5.

[70] Bickford Affidavit, ¶ 25.

Barber Foods' wage and hour policies are not in compliance with the law.[71]

13.3. The following plaintiffs left the employ of Barber Foods more than two years before the filing of this action.[72]

Toan Dang	4/2/98
Mohammad Habibzai	5/7/98
Lee Lacroix	7/22/98

Dated: November 8, 2001.

_____

Graydon G. Stevens
Attorney for Defendant Barber Foods

KELLY, REMMEL & ZIMMERMAN
53 Exchange Street
P.O. Box 597
Portland, Maine 04112
(207) 775-1020

**Handwriting omitted*

[71] Bickford Affidavit, ¶ 25.
[72] Bickford Affidavit, ¶ 26.

Exhibit 1

ROTATING ASSOCIATES

NAME	DATE OF HIRE	DATE OF TERMINATION	SHIFT
Aitkenhead, Mark	9/21/98	5/17/99	1,2
Albair, Shaun	1/18/99	4/12/99	2
Carey, Allison	5/25/99	11/28/00	1,2
Carter, Erlinda	3/8/99	5/7/01	2
Chase, Corey	2/28/00	8/16/00	1,2
Dang, Toan	11/8/96	4/2/98	1,2
Dumont, Angela	6/19/00	7/10/00	1
Habibzai, Mohammad	1/11/93	5/7/98	1
Hailu, Letecheal	9/9/91		2
Huntley, Robert	12/20/99	5/17/00	2
Keraghan, Diane	7/2/96	5/17/99	1,2
Lemire, Gordon	11/30/98	1/29/99	2
Luongo, Natalie	6/5/00	9/6/00	1
Mason, Paul	12/7/98	10/18/99	2
Mekonen, Derso	4/29/91		1
Morgan, Lisa	9/20/99	5/22/00	2
Novikova, Tatyana	1/2/97		1,2
Ouellette, Robert	1/31/01	2/13/01	2
Pardue, Kyra	4/12/99	5/19/99	2
Raymond, Joseph	11/27/00	12/24/00	2
Rubito, Doug	10/12/93	12/15/00	2
Sayed, Najib	4/10/95	2/15/00	1
Theunissen, Evelyn	10/24/94		1
Tum, Abdela	3/28/90		1
Wallace, Heidi	9/7/00	1/15/01	1,2
Yirnam, Mintwab	11/17/97	2/9/01	1,2

SET-UP OPERATORS

NAME	DATE OF HIRE	DATE OF TERMINATION	SHIFT
Florendo, Celso	7/18/94		2
Olszynski, Tadeusz	9/16/91		2

MEATROOM

NAME	DATE OF HIRE	DATE OF TERMINATION	SHIFT
Levesque, Ernest	6/20/88	9/13/99	1

MAINTENANCE

NAME	DATE OF HIRE	DATE OF TERMINATION	SHIFT
Bearce, Nicholas	8/10/98	10/22/99	1,2
Knox, Scott	4/15/98	7/6/00	2

SHIPPING AND RECEIVING

NAME	DATE OF HIRE	DATE OF TERMINATION	SHIFT
Smith, Michael	1/16/79	7/30/99	1
Snow, Kevin	12/15/92	8/30/99	

SANITATION

NAME	DATE OF HIRE	DATE OF TERMINATION	SHIFT
Chadbourne, Sandra	12/27/99	4//17/00	3
Devine, William	1/4/99	2/8/99	3
Hamilton, Peter	8/30/99	9/28/99	3
Howard, Albert	7/7/95	6/16/99	3
Lacroix, Lee	3/30/98	7/22/98	3
Lewis, Gladstone	1/15/92	1/24/99	3
Reynolds, Brad	10/2/95	4/21/00	3
Rubin, Robert	11/23/98	8/26/99	3

MULTIPLE POSITIONS

NAME	DATE OF HIRE	DATE OF TERMINATION	JOB	SHIFT
LaMarche, Ken	7/20/98	8/26/99	Sanitation I (4/4/99)	3
			Production (5/10/99)	2
Ngo, The	9/12/94	8/19/99	Set-Up (12/15/96)	2
			Production (5/3/98)	2
Secord, Lauric	3/29/99	4/23/01	Production	2
			Set-up (10/31/99)	2

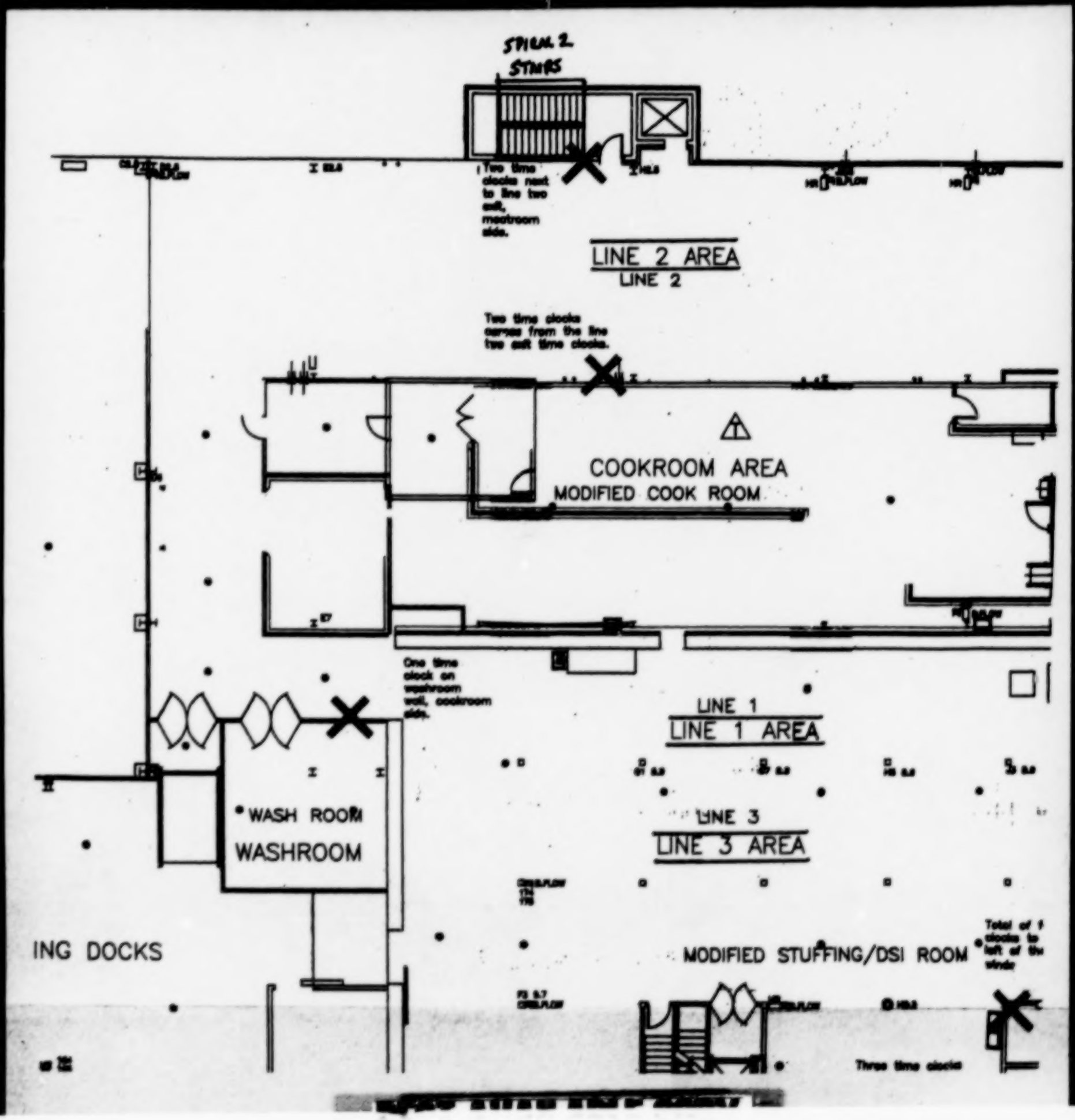
SPIRAL 2 STAIRS
Two time clocks next to line two exit, mealroom side.
LINE 2 AREA
LINE 2
Two time clocks across from the line two exit time clocks.
COOKROOM AREA
MODIFIED COOK ROOM
One time clock on washroom wall, cookroom side.
WASH ROOM
WASHROOM
LINE 1
LINE 1 AREA
LINE 3
LINE 3 AREA
ING DOCKS
MODIFIED STUFFING/DSI ROOM
Three time clocks

Exhibit 3

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, et al,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL NO.CV-00-371-P-C
	)	
BARBER FOODS,	)	
	)	
Defendant.	)	

AFFIDAVIT OF PETER BICKFORD

I, Peter Bickford, state under oath as follows:

1. My name is Peter Bickford. I have been employed at Barber Foods since 1979 and have been manager of the human resources department since 1986. My current title is senior human resources business partner. I have personal knowledge of the matters discussed in this affidavit.

2. Barber Foods is a further processor of poultry-based, center-of-the-plate products. Its production facilities are located at one site in Portland.

3. Barber Foods has two production shifts. Both shifts have six lines - three specialty lines and three pack-out lines. The specialty lines are where the product - Chicken Kiev, Chicken Cordon Bleu, etc. - is assembled. After moving through the specialty lines, the finished product moves into large spiral freezers. The product comes [page2]

out the other side of the freezers onto pack-out lines where it is pouched, packed and palletized.

4. The production lines are staffed primarily by what Barber Foods calls rotating associates (the associates generally rotate to different positions on the lines every two hours). The rotating associates are the largest classification of associates at Barber Foods. There are 149 rotating associates on each shift. This number has not changed significantly in the last three years.

5. In addition to rotating associates, each line has set-up operators whose primary duties are to make sure that the various machines on the lines are operating smoothly. The specialty lines have a forming machine which forms the basic product, e.g. chicken fingers, nuggets, or patties for a stuffed product, a stuffing machine, and a breading machine. The pack-out lines have a poucher, a boxer, and a taper. The set-up operators set the machines up for the particular product being run, making adjustments as directed to things such as temperature, speed, resupply, thickening batter, correcting jambs, etc. The set-up operators are the second largest classification of associates at Barber Foods. There are 34 set-up operators on each shift. This number has not changed significantly in the last three years.

6. Barber Foods has no slaughtering, butchering, or deboning operations. It purchases boneless chicken breast in bulk. The chicken breast is prepared for the [page3] production lines in the meat room, where the raw product is thawed, ground, blended with ingredients, and put into formula for the various products.

7. There are 44 plaintiffs - 7 present associates and 37 former associates. The plaintiffs fall within the following six job classifications:

Rotating Associates
Set-up Operators
Meatroom
Shipping & Receiving
Maintenance
Sanitation

8. Exhibit 1 is a list of the plaintiffs by job classification, with dates of employment and shift.

9. Barber Foods has three shifts. The first two shifts are production shifts and the third shift is for the sanitation crew. The shift schedules are:

First:	6:30 a.m. - 3:00 p.m.
Second:	3:45 p.m. - 12:15 a.m.
Third:	11:30 p.m. - 6:30 a.m.

10. Associates in different job classifications start at varying times prior to the general production shift start. The start times for the job classifications relevant to this case are as follows:

First Shift

Set-up Operators:	5:00 a.m.
Maintenance:	5:00 a.m.
Meatroom:	5:00/5:30 a.m.
Shipping & Receiving:	5:45/6:15 a.m.
Rotating Associates:	6:30 a.m.

Second Shift

Meatroom:	2:00 p.m.
Maintenance:	3:00 p.m.
Set-up Operators:	3:15 p.m.
Shipping & Receiving:	3:15 p.m.
[page 4] Rotating Associates:	3:45 p.m.

Third Shift

Sanitation: 11:30 p.m.

11. Associates are expected to be on the production floor ready to work when their shift commences. However, with some variation by job classification, there is generally a twelve minute buffer period at the start of the shift whereby associates are allowed to punch in up to six minutes early and may also punch in up to six minutes late without being deemed tardy; e.g., a rotating associate on the first shift may punch in between 6:24 a.m. and 6:36 a.m. Associates are paid from the time they actually punch in, although they may be subject to counseling and/or disciplinary action at their crew lead's discretion if they do not punch in within the twelve minute buffer period.

12. Associates are given two paid breaks, 15 minutes in the first half of the shift and 10 minutes in the second half. In each break they are given an extra 5 minutes to get to and from the production floor to the cafeteria/break area, so the actual paid time away from production is actually 20 minutes and 15 minutes, respectively. [page 5]

13. Associates are given a 30 minute unpaid meal break in the middle of the shift. They are also given an extra five minutes with this break to get to and from the production floor to the cafeteria/break area, so the actual time away from production is 35 minutes, 5 paid and 30 unpaid.

14. Associates may leave the premises during their breaks. They must remove their lab coat before leaving the plant.

15. Barber Foods utilizes a computerized time-keeping system. Each associate has a swipe card with a bar

code. The system downloads clock punches into the payroll software.

16. Time clocks are located at the entrances/exits to the production floor and at the various production areas, such as packout 1, specialty 2, meatroom, etc.

17. Associates are paid from punch in to punch out. The system automatically deducts ½ hour for the unpaid meal break, with the exception of sanitation associates who are paid from punch in to punch out and are paid through their meal break.

18. Exhibit 2 consists of drawings of the production floor and lower level with the production areas, entrances/exits, time clocks, equipment cage and other referenced locations identified and highlighted, and approximate distances given.

19. Associates are free to do anything they wish, including leaving the premises, during their unpaid break.. [page 6]

20. Barber Foods has a medical office which is staffed by a nurse from 6:00 a.m. - 6:30 p.m., Monday - Friday and also by a physician from 2:00 p.m. - 5:00 p.m., Tuesdays and Thursdays.

21. Initial appointments are made by an associate's crew lead. This is done electronically. The nurse posts the appointment times in half-hour increments on the computer and if an associate needs to visit the office on other than an emergency basis, the crew lead checks the available appointment times on the computer and generally tries to schedule the associate for the next available slot.

22. Appointments are always scheduled during an associate's shift if possible. Associates are paid for visiting the medical office.

23. Appointments cannot be scheduled during an associate's meal break on the second and third shifts because the medical office is not staffed when those meal breaks occur. On the first shift, medical appointments are not scheduled during an associate's unpaid meal break. If it happens because this was the only available slot, the associate is paid for the time and allowed to take his or her entire meal break before or after the appointment.

24. I am not aware of any situation where an associate was required to visit the medical office during a meal break, not paid for that time, and not allowed to make up the entire break. If this did happen, it would be contrary to Barber Food's policies. [page 7]

25. I am primarily responsible for monitoring FLSA compliance at Barber Foods. In my capacity as manager of the human resources department, I attend annual seminars on labor and employment issues, which usually contain segments on wage and hour issues, and subscribe to numerous periodicals, including trade magazines, human resources managers' newsletters, Maine Employment Law Letter, and Maine Business & Employment Law, all of which deal regularly with wage and hour issues. Nothing I have learned through attending these seminars or reviewing these periodicals has indicated to me that Barber Foods wage and our policies, and specifically those concerning pre-shift and post-shift activities, meal breaks, and medical appointments, fail to comply with the FLSA.

26. The following plaintiffs left the employ of Barber Foods more than two years before filing of this action:

Toan Dang	4/2/98
Mohammad Habibzai	5/7/98
Lee Lacroix	7/22/98

Dated: November 8, 2001.

_____

Peter Bickford

STATE OF MAINE

November 8, 2001.

Cumberland, ss.

Personally appeared Peter Bickford and gave oath that the above affidavit is true and correct to the best of his personal knowledge.
**Handwriting omitted.*
[page 8]

Before me,

_____

Notary Public/Attorney-at-Law
**Handwriting omitted.*

Exhibit 4

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, et al,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL NO.CV-00-371-P-C
	)	
BARBER FOODS,	)	
	)	
Defendant.	)	

AFFIDAVIT OF WILLIAM WHITTIER

I, William Whittier, state under oath as follows:

1. My name is William Whittier. I have been employed at Barber Foods since 1991 and have been Director of Production for approximately six years. I have personal knowledge of the matters discussed in this affidavit.

2. All associates are required to have on the following sanitary and/or safety clothing or equipment before entering the production floor: lab coat, hairnet, beardnet (if applicable) and earplugs. Since October 15, 2001, Barber Foods has also required all associates on the production floor to wear safety glasses. Before October 15, only certain positions or tasks required safety glasses.

3. In addition to the lab coat, hairnet/beardnet, earplugs, and safety glasses required by every associate entering the production floor, there are other items of clothing [page 2] or equipment worn by some associates for safety, sanitary, or comfort purposes. Depending upon job

classification, assignment, and personal preference, some combination of the following may be worn: vinyl gloves, cotton glove liners, vinyl aprons, sleeve covers, bump hats, back belt, steel-toed boots.

4. Lab coats and cotton glove liners are available to the associates in the hallway between the cafeteria and the equipment cage. The lab coats are on hanger racks and the cotton glove liners are in tubs separated by size.

5. Hairnets, beardnets, earplugs, vinyl gloves, sleeve covers, and aprons are dispensed from the window of the equipment cage.

6. Vinyl gloves, sleeve covers, and aprons are also available from tubs on the production floor. Associates may obtain these items from the window or the tubs, at their option. Most associates obtain sleeve covers and aprons, if they choose to wear them, from the tubs on the production floor.

7. Before August 3, 1999, hairnets/beardnets, earplugs, vinyl gloves, sleeve covers, and aprons, along with lab coats and cotton glove liners, were available to associates from racks and tubs in the cafeteria. Since August 3, 1999 these items, with the exception of the lab coats and glove liners, have been dispensed from the cage.

8. The cage is open continuously from 5:00 a.m. - 1:00 a.m. It is staffed by one associate, with a second assistant from 5:30 a.m. - 7:30 a.m. and 1:30 p.m. - 4:00 p.m.

[page 3]

9. There are male and female locker rooms and all associates are offered the use of a locker. Associates may use their lockers at their option to store reusable clothing or

equipment such as safety glasses, bump hat, back belt, safety boots, and for personal belongings or clothing.

10. Lab coats must be removed if an associate leaves the premises. Lab coats, gloves, aprons, and sleeve covers must be removed if the associate uses the bathroom. Most associates, if they are wearing aprons or sleeve covers, will throw them away when they take them off and will obtain new ones from tubs on the production floor after returning from break.

Dated: November 8, 2001.

_____

William Whittier

STATE OF MAINE November 8, 2001.
Cumberland, ss.

Personally appeared William Whittier and gave oath that the above affidavit is true and correct to the best of his personal knowledge.

Before me,

_____

Notary Public/Attorney-at-Law

**Handwriting omitted*

Exhibit 5

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, et al,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL NO.CV-00-371-P-C
	)	
BARBER FOODS,	)	
	)	
Defendant.	)	

AFFIDAVIT OF THOMAS PAGE

I, Thomas Page, state under oath as follows:

1. My name is Thomas Page. I have been employed at Barber Foods for 8 years and have been the second shift manager for over 3 years. I have personal knowledge of the matters discussed in this affidavit.

2. Lab coats and cotton glove liners are laundered and reused. Laundry bins are located at several locations along the hallway from the production floor exits to the plant exits and associates drop the coats and liners in these bins on their way out of the plant. [Page 2]

3. Vinyl gloves, sleeve covers, and aprons are disposable. Trash bins are located on the production floor and along the hallway from the production floor exits to the plant exits. These items may be removed and deposited in the trash bins on the production floor before punching out if the associate chooses.

4. Bump hats, back belts, safety glasses, steel toed safety boots, and reusable earplugs are retained by associates and may be stored in their locker, in their vehicle, or taken home, at their option. Most associates issued steel-toed boots wear them home.

5. There is no specific "assembly line" arrival process. Some associates grab their lab coats and glove liners, go to the cage, and then to their lockers; others go to their lockers, then back to the cage. Some associates stop and socialize in the cafeteria before picking up anything, others go to the cage and/or lockers and then back to the cafeteria. Some do not socialize, but simply pick up their stuff and proceed directly to the production floor with the required clothing and equipment ready to work when the shift starts.

6. Depending upon the route taken, the actual walking time from entering the plant to arriving at the time clock where the associate punches in may be from 1-3 minutes.

Dated: November 8, 2001.

_____

Thomas Page

**Handwriting omitted.* [Page 3]

STATE OF MAINE
Cumberland, ss.

November 8, 2001.

Personally appeared Thomas Page and gave oath that the above affidavit is true and correct to the best of his personal knowledge.

Before me,

_____
Notary Public/Attorney-at-Law

**Handwriting omitted.*

Exhibit 6
UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, et al,	)
	)
Plaintiffs,	)
	)
v.	)CIVIL NO.CV-00-371-P-C
	)
BARBER FOODS,	)
	)
Defendant.	)

AFFIDAVIT OF CATHERINE SMITH

I, Catherine Smith, state under oath as follows:

1. My name is Catherine Smith. I have been employed at Barber Foods since 1992 and have been a crew lead on both the first and second shift since before December 1997. I have personal knowledge of the matters discussed in this affidavit.

2. All rotating associates are required to wear the following: lab coat, hairnet/beardnet, earplugs, and safety glasses.

3. Associates punch in on the production floor on time clocks in their production area. They must have their lab coats, hairnets and earplugs on before entering the floor to punch in. Gloves, aprons and sleeve covers are optional. Most associates choose to wear gloves. Aprons and sleeve covers are worn by most associates on the specialty lines, but infrequently on the pack-out lines. [Page 2]

4. Not counting walking time or any waiting time, it may take 30 seconds to a minute to actually don the lab coat and a few seconds each to don a hairnet and earplugs before punching in. Hairnets and earplugs are often donned by the associates while walking to the floor. Gloves are usually put on after punching in. Aprons and sleeve covers, if the associate chooses to wear them, are usually obtained from tubs on the production floor and donned after punching in.

5. At the end of the shift, the vinyl gloves, aprons and sleeve covers are usually doffed and thrown in the trash bins on the production floor before punching out. After punching out, the hairnet, earplugs, safety glasses and gloves take seconds to doff and are usually taken off while walking down the stairs. Doffing the lab coat may take 15 to 30 seconds. The hairnet is thrown in trash bins located in the hallway and the lab coat and glove liners are thrown in laundry bins while the associate is walking out of the plant.

6. Medical appointments are not scheduled during an associate's unpaid meal break. If it happens because this was the only available slot on the nurse's schedule, the associate is paid for the time and allowed to take his or her entire unpaid meal break before or after the appointment. I am not aware of any situation where an associate was required to visit the medical office during a meal break, was not paid for that time, and was not allowed to make up the entire break.

7. During busier times, there occasionally may be small lines at the coat racks and glove liner bins, the cage windows, or at the time clocks. During these times, an [Page 3] associate occasionally may have to wait, usually less than a minute, to obtain a coat and glove liners, or to obtain items from the cage, or to punch in. Most often, there are no lines

and it takes only a few seconds each to grab a coat and glove liners, get a hairnet and gloves from the cage, or to punch in.

Dated: November 08, 2001.

_____

Catherine Smith
**Handwriting omitted*

STATE OF MAINE

November 8, 2001.

Cumberland, ss.

Personally appeared Catherine Smith and gave oath that the above affidavit is true and correct to the best of her personal knowledge.

Before me,

_____

Notary Public/Attorney-at-Law
**Handwriting omitted.*

Exhibit 7

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, et al,	)
	)
Plaintiffs,	)
	)
v.	)CIVIL NO.CV-00-371-P-C
	)
BARBER FOODS,	)
	)
Defendant.	)

AFFIDAVIT OF TYRONE IVE

I, Tyrone Ive, state under oath as follows:

1. My name is Tyrone Ive. I have been employed at Barber Foods since 1984 and have been a set-up lead on both the first and second shift for over ten years. I have personal knowledge of the matters discussed in this affidavit.

2. All set-up operators are required to wear or have the following: lab coat, hairnet/beardnet, earplugs, safety glasses, steel-toed safety boots, bump hat, back belt, and LOTO (lockout/tag-out consisting of a padlock and plastic ID tag).

3. Associates don the required equipment and then punch in on the production floor on time clocks in their production area. It takes approximately three minutes to don everything. If they choose to wear their steel-toed safety boots home rather than keep them in the locker, it would take less time. [Page 2]

4. Prior to punching out, associates return to the cage any items they had checked out earlier in connection with the machines they were operating that day, such as cook code numbers and metal detector sticks. These are small items that can easily be held in one hand or in the pocket of the lab coat. It may take up to one minute to return these items to the cage.

5. After punching out at the end of the shift, associates deposit their lab coat, gloves and hairnet in the laundry and trash bins on the way out. Safety glasses, bump hat, back belt, steel-toed safety boots, and LOTO are stored in their lockers, in their vehicles, or taken home, at their option. Most store this equipment in their lockers although most associates do wear their boots home. It takes less than three minutes to doff and dispose of or store this equipment.

6. Medical appointments are not scheduled during an associate's unpaid meal break. If it happens because this was the only available slot on the nurse's schedule, the associate is paid for the time and allowed to take his or her entire unpaid meal break before or after the appointment. I am not aware of any situation where an associate was required to visit the medical office during a meal break, was not paid for that time, and was not allowed to make up the entire break.

Dated: November 08, 2001.

_____

Tyrone Ive

[Page 3]

STATE OF MAINE
Cumberland, ss.

November 8, 2001.

Personally appeared Tyrone Ive and gave oath that the above affidavit is true and correct to the best of his personal knowledge.

Before me,

_____

Notary Public/Attorney-at-Law

Exhibit 8

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, et al,	)
	)
Plaintiffs,	)
	)
v.	)CIVIL NO.CV-00-371-P-C
	)
BARBER FOODS,	)
	)
Defendant.	)

AFFIDAVIT OF DOUGLAS GOODWIN

I, Douglas Goodwin, state under oath as follows:

1. My name is Douglas Goodwin. I have been employed at Barber Foods since 1991 and have been a meatroom lead since before December 1997. I have personal knowledge of the matters discussed in this affidavit.

2. All associates in the meatroom are required to wear or have the following: lab coat, hairnet/beardnet, earplugs, safety glasses, vinyl gloves, aprons (heavier weight vinyl), sleeve covers (heavier weight vinyl), rubber steel-toed boots, back belt, and LOTO.

3. Associates don the required equipment and then punch in at the meatroom clock. It takes approximately three minutes to don the required clothing and equipment. [Page 2]

4. At the end of the shift, the associates wash their boots, if necessary, and then punch out at one of the

"out" clocks by the exits. They deposit their lab coats, gloves, hairnet, sleeve covers and aprons in the laundry and trash bins. The vinyl gloves, aprons and sleeve covers may be, and usually are, deposited in the trash bins available on the production floor before punching out. The remaining items are stored in the locker or taken home. It takes less than three minutes to doff the equipment after punching out.

5. Medical appointments are not scheduled during an associate's unpaid meal break. If it happens because this was the only available slot on the nurse's schedule, the associate is paid for the time and allowed to take his or her entire unpaid meal break before or after the appointment. I am not aware of any situation where an associate was required to visit the medical office during a meal break, was not paid for that time, and was not allowed to make up the entire break.

Dated: November 8, 2001.

_____

Douglas Goodwin

STATE OF MAINE November 8 ,2001.
Cumberland, ss.

Personally appeared Douglas Goodwin and gave oath that the above affidavit is true and correct to the best of his personal knowledge.

Before me,

_____

Notary Public/Attorney-at-Law

**Handwriting omitted.*

Exhibit 9

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, et al,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL NO.CV-00-371-P-C
	)	
BARBER FOODS,	)	
	)	
Defendant.	)	

AFFIDAVIT OF TIMOTHY SCANLIN

I, Timothy Scanlin, state under oath as follows:

1. My name is Timothy Scanlin. I have been employed at Barber Foods since 1981 and have been a supervisor in the shipping and receiving department since before December 1997. I have personal knowledge of the matters discussed in this affidavit.

2. All associates in the shipping and receiving department are required to wear the following: safety glasses, steel-toed safety boots, and bump hat. A lab coat, hairnet, and earplugs are required whenever an associate must enter the production floor, and freezer wear is required when it is necessary to enter the freezer.

3. Associates punch in on the plant office clock on the production floor. When they arrive at work they go to the shipping office which is on the production floor level next to the entrance and don a lab coat, hairnet and earplugs in order to enter the [Page 2] production floor to punch in at

the clock. Lab coats, hairnets and earplugs are kept in the shipping office for this purpose. It takes one minute or less to put this equipment on in order to go in and punch the clock. After punching in, they return to the shipping office to doff the lab coat, hairnet and earplugs and then go to their assigned work area, unless they are going to work directly on the production floor or freezer from the time clock.

4. At the end of the shift, the associates punch out at the same clock. They must again come up to the shipping office and put on a lab coat, hairnet and earplugs before entering the production floor to punch out. After punching out, they leave the lab coat in the shipping office, drop the hairnet and earplugs in the trash, and leave the plant. It takes one minute or less to doff the coat, hairnet and earplugs after punching out.

5. Medical appointments are not scheduled during an associate's unpaid meal break. If it happens because this was the only available slot on the nurse's schedule, the associate is paid for the time and allowed to take his or her entire unpaid meal break before or after the appointment. I am not aware of any situation where an associate was required to visit the medical office during a meal break, was not paid for that time, and was not allowed to make up the entire break.

Dated: November 8, 2001.

_____

Timothy Scanlin

[Page 3]

STATE OF MAINE November 8 , 2001.
Cumberland, ss.

Personally appeared Timothy Scanlin and gave oath that the above affidavit is true and correct to the best of his personal knowledge.

Before me,

_____

Notary Public/Attorney-at-Law

Exhibit 10
UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, et al,	)
	)
Plaintiffs,	)
	)
v.	)CIVIL NO.CV-00-371-P-C
	)
BARBER FOODS,	)
	)
Defendant.	)

AFFIDAVIT OF CLETIS R. BRAGG, JR.

I, Cletis R. Bragg, Jr., state under oath as follows:

1. My name is Cletis R. Bragg, Jr. I have been employed at Barber Foods since 1981 and have been the third shift manager of the sanitation department since 1984. I have personal knowledge of the matters discussed in this affidavit.

2. All associates in the sanitation department are required to wear or have the following: lab coat, hairnet/beardnet, earplugs, safety glasses, gloves, rain pants, rubber steel-toed boots, bump cap, hose nozzle, LOTO. Level 2 associates are also required to have a tool clip (with three wrenches).

3. The shift is scheduled to start at 11:30 p.m. Associates punch in on the cafeteria clock. They may punch in between 11:20 p.m. - 11:36 p.m. We meet in the [Page 2] cafeteria at 11:35 p.m. to review safety issues and the night's routine. Following the meeting, we go upstairs to work at 11:45 p.m.

4. Associates are generally paid to get ready. The general practice is to punch in at the cafeteria and then get your clothing and equipment and report back to the cafeteria for the 11:35 p.m. meeting. Most associates are there having coffee or something to eat when the meeting starts. Associates may get and put on their clothing/equipment prior to 11:20 before coming back to the cafeteria to punch in if they wish, but this would be at their option, it is not required. If an associate is running late, he/she will punch in when he/she arrives for the meeting and then get dressed after the meeting before going upstairs. In any event, most associates choose to punch in before going to the cage and lockers and getting dressed.

5. At the end of the shift, the associates wash their rain pants and tools while on the clock and then punch out at the plant office clock. They then go down the stairs, deposit their lab coats and glove liners in the laundry bins, their hairnets, gloves and other disposables in the trash bins, and their rain pants, boots and other reusable items in their lockers.

6. Depending upon the associate, it generally takes from 2-4 minutes to put on the clothing and equipment pre-shift and slightly less time to take it off and deposit it in the laundry and trash bins and in the lockers post-shift. Much of it is done while walking. [Page 3]

7. Sanitation associates are paid from punch in to punch out. The 30 minute meal break is paid as coffee breaks cannot be guaranteed. No medical appointments are made during lunch as the medical office is not staffed during the third shift.

Dated: November __9__ , 2001.

_____

Cletis R. Bragg, Jr.

STATE OF MAINE November __9__ , 2001.
Cumberland, ss.
**Handwriting omitted.*

Personally appeared Cletis R. Bragg, Jr. and gave oath that the above affidavit is true and correct to the best of his personal knowledge.

Before me,

_____

Notary Public/Attorney-at-Law

**Handwriting omitted.*

Exhibit 11

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, et al.,	)
Plaintiffs,	) Docket No.
	) CV-00-- 371-P-C
vs.	)
	) VOLUME I
BARBER FOODS, INC.,	)
d/b/a BARBER FOODS,	)
Defendant.	)

30(b) (6) DEPOSITION of BARBER FOODS, INC. (William C. Whittier), taken pursuant to notice dated July 12, 2001, at the Law Offices of William C. Nugent, 75 Pearl Street, Portland, Maine, on August 13, 2001, commencing at 3:15 P.M., before Lisa M. Stiles, Registered Professional Reporter, a Notary Public in and for the State of Maine.

[page 12]
1 on. We have had discussions about previous work places and
2 whether or not they have had like processes and whether or
3 not they paid the associates to put their uniforms, if you
4 will, on or not. That's basically a summary of what was
5 talked about.
6 Q. When you say previous work places, you mean previous
7 work places of the participants in the discussions?
8 A. Sure, sure.
9 Q. Okay. Well, by the way, are you aware of the
10 existence of litigation similar to this case raising these
11 same types of claims and issues in -- currently pending
12 against many companies in the poultry processing industry?
13 A. A little bit. I was aware there was some suits
14 brought against meat packers, specifically, and that there

was some activity on the poultry side.
Q. Okay. Now in terms of the amount of time that it takes, you said you have expressed surprise that it's an issue because it takes so little time. How long do you think it takes?
A. To prepare to walk onto the plant floor and to put on the equipment that's necessary, it could take you on the short side, one minute, and on the long side, four at worst case.
Q. Now what would be the variable or variables which would make it four minutes versus one minute or vice-versa?

[page 31]

lawyer for the plaintiffs here. I'm just going to ask you how long does it take -- do you know how long it takes for an employee to get through the various steps to get themselves to where they can clock in and exercise?
A. I believe it takes one minute in the best case scenario and five minutes in the worst.
Q. To actually get to the door, get in the building, go get their lab coats, get to the cage, including any line at the cage, go to their lockers, put on all their stuff, they can do that in a minute?
A. No, I would say to come in here, to come down the hallway, to go to the cage and to go up the stairs and onto the production line in this section of the plant, you could do it in a minute.
Q. Okay.
A. The locker stop might add a minute. When I'm saying five, I'm thinking coming in, walking down the hallway, getting supplies, coming back, going to the men's locker room, sliding on your boots, and going upstairs and getting to your work area, getting out in the plant to one of these clocks.
Q. One to five minutes?
A. One to five.

24 Q. Okay.
25 A. We have a lady I know does it in 30 seconds. We see
[page 37]
1 the past when parking got tight with people coming too
2 early to work and we had to advise them that we didn't
want
3 them to arrive any more than 20 minutes prior to their
4 shift.
Q. Is there -- have you ever observed any occasion when
6 there were more than say five or six people in the cage
7 line?
8 A. I have not.
9 Q. You have never seen that at all?
10 A. No.
11 Q. All right.
12 A. Some of the items at the cage are self-service, the
13 hair net and the ear plugs, if they need them, they can
14 reach into a bin and take them without having to
communicate with the attendants. And I believe I have seen
the gloves in a self-service bin on second shift.
Q. Okay. By the way, when the employees are swiping in on
their -- punching in at the various clocks, do you have the
same situation occur where someone has to swipe two or
three times to get it to register?
A. Maybe 5 percent of the time, 10.
Q. About like the punching out clock?
A. Yep, and they report it to their crew leader who makes
them a new time card. They become delaminated.
Q. Okay. So swiping then can take –
[page 56]
1 Q. Okay.
2 A. We have said in the past that we allow five minutes
3 travel time per break without breaking it down and
4 specifying.
5 Peter broke it down here and seems to have
6 rounded off and only come up with four. If you wanted to
7 talk to the amount of time that we allow for travel and

8 split it and call it beginning and end, it would be
9 two-and-a-half minutes because it's a total of five. The
10 origin of the five minutes was a meeting that I had with
11 Mr. DerHagopian probably seven years ago when he was
12 questioning me on whether or not our people were --
whether
13 or not we were getting the correct amount of production
and
14 what was I doing to monitor breaks. And I went to him
and
15 I said I really need to understand your guidelines before I
16 can report whether or not I'm monitoring breaks. And he
17 said -- and we went through a discussion about were we
18 going to time breaks from touching chicken to touching
19 chicken again and how rigid were we going to be. And at
20 that point, we decided we would time from the last person
21 leaving the line or the work area. The line has got two
22 work areas, the processing and the packing, so we said
from
23 the last person leaving the work area, as in processing, is
24 when we would begin to time it. And we, at that time,
25 decided to add five minutes for travel.
[page 57]
1 Q. Per day or per shift?
2 A. Per break.
3 Q. Per break?
4 A. Per break.
5 Q. Okay. And how did you come up with five minutes?
6 A. I didn't. He did. Sounded good to me and I said
7 okay.
8 Q. Okay.
9 A. Because I knew my employees would appreciate it.
10 Q. Okay. And yet you actually believe it takes
11 considerably less than that, I take it?
12 A. They don't need to rush if they're given
13 two-and-a-half minutes each way or a total of five
minutes.

14 Q. Okay. When they're in that two-and-a-half minutes,
15 it's your expectation that they would walk from where to
16 where on the charts?
17 A. Here. The cafeteria, as Peter said, reports at these
18 double doors.
19 Q. Diagram 3 is what the witness is using here.
20 A. Yep. So that will allow them to get back to where
21 they are workIng on the lines which could be anywhere.
22 Here. Pack-outs.
23 Q. Okay. The witness is indicating --
24 A. Processing areas and pack-out areas on number 4.
25 Q. Okay. So that would take them along this traffic –
[page 58]
1 this line of traffic that Mr. Page drew on the -- on
2 Exhibit 3?
3 A. Exactly.
4 Q. Okay. And onto the processing floor?
5 A. Yep.
6 Q. For that, you decided it takes two-and-a-half minutes,
7 right?
8 A. We--
9 Q. You and Mr. DerHagopian?
10 A. There was no science to it. He just said allow them
11 five minutes for travel.
12 Q. Okay. He thought that would be fair?
13 A. Yep.
14 Q. Okay.
15 A. And we didn't break it down, as Peter has.
16 Q. Okay.
17 A. So the result was a 15-minute -- 15-minute time period
18 between when you stopped working -- the last person
stopped
19 working and we began exercises in the case of the 10-
minute
20 break. A 20-minute period of time between when the last
21 person stopped working and we started exercises on the
22 15-minute break. And a 35-minute period of time between

23 when the last person stopped working and we began exercises
24 on the 30-minute break.
25 Q. Okay. Hold on now. There's five minutes for each
[page 59]
1 break?
2 A. That's correct.
3 Q. To allow for travel time?
4 A. Uh-huh.
5 Q. Whereas Mr. Bickford indicated in the interrogatory
6 answer that the paid time -- the break times are actually
7 19 and 14 minutes respectively, you're saying they're
8 actually 20 and 15 minutes respectively?
9 A. Yes.
10 Q. And that the -- for the lunch break, it's actually 35
11 minutes?
12 A. That's correct.
13 Q. Now I will ask Mr. Bickford tomorrow, but what's your
14 understanding of why he attached the numbers he did?
15 A. I haven't had a conversation with him about it. I
16 don't know.
17 Q. Okay.
18 A. But in all budgets that we have done, in all work I
19 have done with efficiency -- we have had a number of
20 efficiency consultants come in and question it, the
21 standard has been five minutes travel.
22 Q. What efficiency experts are you referring to?
23 A. It's not uncommon for a manufacturing concern to hire
24 an efficiency consultant to come in and look at how they're
25 operating and make recommendations on how they might

Exhibit 12

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, et al.,	)
Plaintiffs,	) Docket No.
	)CV-00--3 71-P-C
vs.	)
BARBER FOODS, INC.,	)
d/b/a BARBER FOODS,	)
Defendant.	)

30(b) (6) DEPOSITION of BARBER FOODS, INC. (Jeffrey David Shaw), taken pursuant to notice dated July 12, 2001, at the Law Offices of William C. Nugent, 75 Pearl Street, Portland, Maine, on August 13, 2001, commencing at 9:15 A.M., before Lisa M. Stiles, Registered Professional Reporter, a Notary Public in and for the State of Maine.

[page 11]
1 Q. So that's what I'm going to mean when I say all 36.
2 A. Okay.
3 Q. All right. Do all 36 wear the same personal
4 protective equipment?
5 A. No, it changes depending on the type of work they're
6 doing and it also -- that's pretty much it, what type of
7 work they're doing.
8 Q. Okay. Is there any portion of the personal protective
9 equipment -- first of all, as I understand, that's
10 something of a term of meaning in the poultry processing
11 business, right?
12 A. Right.
13 Q. Would you define what that term means to you?
14 A. Personal protective equipment could be anything from
15 gloves, safety glasses, ear plugs, face shields, shin
16 guards, work boots. I can go on and on. There is a whole

17 host. Welding masks.
18 Q. Goon.
19 A. Okay. Welding masks, high temperature gloves, you can
20 have -- when you go on the protection floor, to protect the
21 food, over personal clothing, they wear jumpsuits, which I
22 mean overalls by that or they can wear the overcoats, as
23 well as hair nets are required, beard nets, and gloves if
24 they're going to actually handle any food.
25 Q. Okay. Are you familiar with the term LOTO, L-O-T-O?
[page 12]
1 A. Yes.
2 Q. What's LOTO?
3 A. It means lock-out tag-out. That's a program where you
4 are required to lock out machinery before you service the
5 machine in a repair mode, secure the power to protect the
6 person on the machine.
7 Q. So there is-
A. Consists of a padlock with a tag with a person's name
9 on it stating the reason why it's down, designates the
10 department the person is in, and there are many different
11 devices you can attach, depending if it's a valve or a
12 switch to attach that lock to.
13 Q. And do you actually refer to this in the work place as
14 LOTO, as I did, or is it something else?
15 A. Document form, yes, we use LOTO, but when you're
16 talking about it, it's called lock-out.
17 Q. Lock-out?
18 A. Yes.
19 Q. Okay. All right. Now, do all 36 of the maintenance
20 workers have a lock-out?
21 A. Yes, they do.
22 Q. Okay. All right. Now are there any -- is there any
23 subset of the items that you just described that comprise
24 all the personal protective equipment that maintenance

25 workers may wear, is there any subset of that that all the
[page 13]
1 maintenance workers always wear or use?
2 A. They always wear safety glasses. They
always have to
3 have an overall on or a lab coat when they go upstairs and
4 they must wear steel toed boots of some sort at all times
5 or steel toed shoes.
6 Q. Okay. Is there another subset of that personal
7 protective equipment which the maintenance workers
usually
8 wear?
9 A. That pretty much covers it.
10 Q. Okay. So all the other things that you listed - - and
11 there were quite a few -- depend on what they're doing?
12 A. Special circumstance, right. If they are going to do
13 welding, for instance, they would wear a welding mask,
but
14 they wouldn't wear a welding mask if they're going out
on
15 the floor.
16 Q. What about the hair net and beard cover and hearing
17 protection?
18 A. Hair net is required to go on the floor, but it's not
19 required in the shop. It's only when you go on the
20 production floor itself.
21 Q. Okay. I have here a-
22 MR. FLEMING: Graydon, I didn't really reproduce
23 it again because of the size and wasn't going to use it as
24 an exhibit, per Se, if we could -- I think we can probably
25 agree that these are the blueprints that you sent me or the
[page 19]
1 lockers in the maintenance room itself, so the maintenance
2 guys don't have any lockers there.
3 Q. Okay. All right. So with regard to personal
4 protective equipment that the maintenance workers wear,
how

5 do they find out each day what personal protective
6 equipment they're supposed to be wearing for that day?
7 A Okay. Your term personal protective equipment, is to
8 me not - - from a maintenance standpoint, I don't
think of
9 hair nets, beard nets, rubber gloves as personal
10 protective equipment. I think of that more as product -
11 protecting, so are you including all that?
12 Q. Right. Whatever they have to wear that is different
13 than their street clothes.
14 A. Okay. Every day, maintenance, when they come into
the
15 plant, they're told that steel toed boots are required at
16 all times for maintenance. When you enter the production
17 areas, you have to have a hair net on every day without
18 exception. If you have a beard, you have to have a beard
19 net on without exception. And coveralls or a lab coat as
20 well as ear plugs and safety glasses.
21 Q. Okay. Those are what they always wear?
22 A. What they always wear.
23 Q. At least with respect to the beard nets and the hair
24 nets if they go in the production floor?
25 A. Yes, if they're not -- well, go ahead.
[page 20]
1 Q. And if they're not going on the production floor?
2 A. If they're not going on the production floor, they
3 have to use safety glasses and steel toed work boots,
4 that's it.
5 Q. They wear safety glasses regardless of whether they
6 are doing a job right then?
7 A. Uh-huh.
8 Q. Any time they're in the plant?
9 A. Any time they're in the plant as of, I think it was,
10 February -- it was around February or March of
2001 that we
11 implemented a safety glass policy throughout the plant to
12 try to cut down on injury rates.

13 Q. And prior to that -- I mean, how did that new policy
14 change the old policy, how was it different?
15 A. The old policy, safety glasses were not required
16 unless you were doing some form of spark producing
17 equipment task or any type of hammering, things like that.
18 Q. So these items that are -- are always required,
19 routinely required, are they issued to the maintenance
20 workers and they keep them or did they have to obtain
some
21 of them each day?
22 A. Every day, they have to obtain either a lab coat or
23 overalls, coveralls, as we call them. As far as steel toed
24 boots, they're issued them once a year. It's up to them to
25 make sure they get them on before they enter the
production
[page 22]
1 Q. Where do they obtain that?
2 A. Currently, they obtain it as soon as they walk in the
3 lower level entrance, there's a little room off the right,
4 I believe it's the kiev room.
5 Q. It's what?
6 A. It's called the kiev room?
7 Q. The kiev room?
8 A. Yes. Currently, that's where the lab coats and the
9 coveralls are located. Prior to that -- well, prior to the
10 new construction where the new parts room is, they were
11 located in dry goods.
12 Q. In dry goods?
13 A. Yes.
14 Q. Now where is the kiev room?
15 A. Kiev room would be on this print here, on the lower
16 level north, it would be office, it says 118.
17 Q. Okay. Actually, that says 116, I think, isn't it?
18 A. Yes, 116.
19 Q. From whom -- well, do they just pick it up out of the
20 kiev room or is there a person that works in there that
21 hands them out?

A. No, they just pick it up either when they come into work or any time entering the building, they pick it up before they go on the floor. That's the main requirement.
Q. Where do they enter the building?
[page 25]
Q. They're all assigned to a particular line?
A. That's correct, they come into the shop, punch in, and go up to the production floor.
Q. Okay. All right. They punch in where?
A. As soon as they walk in the maintenance door, right there, there is a time clock. They all have time cards right next to the clock, they pick it out and punch in.
Q. So you are indicating on this diagram -- I suppose what we should do, really, is label these diagrams. It should have been obvious, I suppose. Why don't you do it,
just label this one in the lower left with a big number one.
A. Okay.
Q. And then let's label this one number two.
A. Uh-huh.
Q. Then three and four.
Okay. The witness has labeled the diagrams one, two, three and four. We are looking presently at diagram number one. The maintenance -- in the maintenance shop, there is a clock, a punch-in clock. Why don't you put an X where the maintenance clock is.
Okay. Thank you. Now their time cards are in a--
A. Little rack right next to the time clock.
Q. Are those time cards used to actually pay the
[page 26]
employees?
A. Yes.
Q. Okay. So when they clock in, they're being paid?
A. Yes.
Q. And they clock in as soon as they walk in the room?

A. As soon as they walk in the room, they clock in.
Q. Okay. So do they do that before they put -- before they go to the kiev room?
A. Most people, out of convenience when they come in, they will pick up their uniform as they walk to the maintenance shop and punch in, but that's certainly not mandated, you know, come in, punch in, get suited up, what you need.
Q. So if they come into an entrance on the -- this is the St. John side on the lower part of the diagram number one?
A. Correct -- no, actually, on the lower level, there isn't an exit, you have to go to the upper level which would be number two.
Q. All right. In some cases, they may punch in and then go to the kiev room and sometimes they may go to the kiev room and then punch in?
A. Correct.
Q. The other items -- do they get anything else from the kiev room other than the lab coat and coveralls?
A. No.

[page 27]

Q. Okay. Do they have safety glasses issued to them?
A. Yes, they do.
Q. And they have the boots issued once per year, right?
A. Correct.
Q. Where do they keep those things?
A. Most of the people keep their safety boots or their eye glasses in their own locker inside the maintenance shop. Each person has been issued a locker. Most of the time, most people wear their boots home, safety boots. Safety glasses, they do hang up in their locker for the most part.
Q. Now the other items of equipment, protective

equipment
13 that they may wear on any given day, from where do they
14 obtain those items?
15 A. A lot of people have them in their locker already.
16 Many people have -- they store it in the parts room or we
17 store it for them so we know we have a good supply of
18 safety equipment for them and that it doesn't get taken
19 home or lost or whatnot.
20 Q. How about the lock-out?
21 A. Each person was issued two lock-out devices with
22 locks. We do training once a year. And it's up to them to
23 maintain storage of them. Most people put them in their
24 toolboxes or their lockers.
25 Q. Okay. Some of the items you mentioned were, for
[page 28]
1 instance, sleeves of some kind; is that right?
2 A. Maintenance doesn't wear sleeves. That was a
3 that's not required.
4 Q. Okay. Without regard to whether it's required, do
5 they ever wear them?
6 A. I have never, firsthand, seen any maintenance guy wear
7 a sleeve.
8 Q. Okay. The hair net and beard nets, where do they get
9 those?
10 A. In the maintenance shop, on top of the
refrigerator,
11 we keep a supply in there.
12 Q. And hearing protection?
13 A. Same place, on top of the fridge.
14 Q. All right. The other items that they may
wear, there
15 is the welding mask and you named a whole bunch of
other
16 things that I didn't have time to write down --
17 A. Most of it is all in the maintenance shop or in the
18 supply room.
19 Q. So before they put those things on, the

maintenance
20 workers have clocked in?
21 A. Yes.
22 Q. So they're being paid for that time that they're
23 putting on that type of equipment, right?
24 A. Yes, unless -- for the most part, I can say yes. If a
25 guy comes in early and he wants to go down there and get
[page 29]
1 all the stuff first, that's his choice, but most people
2 come right in and punch in and then go do their thing.
3 Q. Stands to reason better to get paid for putting this
4 stuff on than not getting paid, right?
5 A. If that's your preference, yeah, I can see that.
6 Q. What do you do, are you salaried or are you hourly?
7 A. I'm still hourly. It changes from day to day.
8 Sometimes I forget to punch in until 15 after and then
9 punch in, but most times, I grab it on the way up.
10 Q. But if you remember to do it, you make it your general
11 practice to punch in before you round up the personal
12 protective equipment that you need to wear for the day,
13 right?
14 A. General practice, I would -- no, I can't say. It
15 changes every day. It doesn't really matter to me, it's
16 only a minute or two anyways.
17 Q. All right.
18 A. There are days I walk through the compressor room on
19 the way to the maintenance shop to do rounds and it's no
20 different than walking the other way and I punch in and I
21 go get my uniform, so --
22 Q. All right. Generally, as soon as you enter the
23 maintenance room to arrive to work, you make it your
24 practice to punch in first thing, right?
25 A. Correct.
[page 30]
1 Q. Okay. And as far as you know, is it generally the
2 case that of the -- let's take the 16 men on the first
3 shift, do they generally make it their practice to punch in

4 as soon as they walk in?
5 A. Generally, the first thing they do is punch in, right.
6 Q. Okay. Now at the end of the shift, do the 16 men on
7 the first shift generally -- at the end of the shift, they
8 take off whatever they're wearing in terms of safety gear,
9 right?
10 A. Correct.
11 Q. Take it off right there in the maintenance locker
12 area?
13 A. Yes.
14 Q. And some of it, they -- some of it, they return to--
15 they put the equipment somewhere that they're not going
to
16 take home?
17 A. Yes, most of the people put their personal protective
18 stuff in the locker. Lab coats and stuff, on the way out
19 the door, they throw it in the basket.
20 Q. Is the basket right there in the maintenance area?
21 A. It's about 35, 40 feet outside the door.
22 Q. Which direction? Show me on Exhibit 1.
23 A. Here is the maintenance door. Down at the bottom of
24 these stairs here, there's a basket usually located.
25 Q. All right. Why don't you just put a square where the
[page 31]
1 basket is.
2 A. Okay.
3 Q. That's an X, but put a square around the X.
4 A. And there is also one here, too.
5 Q. All right. The X with the squares are the two
6 baskets.
7 Okay. So they walk out the maintenance door and
8 drop their coats in there?
9 A. Right.
10 Q. And everything else goes in the locker?
11 A. Yep.
12 Q. Anything they throw away each day?
13 A. Hair nets, ear plugs, they throw out.

14 Q. And there's a trash barrel somewhere?
15 A. In the maintenance shop.
16 Q. Now do they do that -- do they take all this equipment
17 off that they're wearing, whatever equipment they're
18 wearing, do they take it off before or after they clock
19 out?
20 A. Most people do it -- well, they take it off before
21 they clock out. A lot of people punch out and the last
22 thing they will take off after they have punched out is
23 their coat, and as they're walking out the door, they throw
24 it in as they're leaving the building.
25 Q. But the other items, they take off, put in the locker
[page 32]
1 or wherever else they might return it?
2 A. Correct.
3 Q. Do they return anything to the parts room?
4 A. No, most of the stuff is all interior in the shop. At
5 times, I'm sure they have.
6 Q. But they take it off, stow it in their locker or
7 wherever they're stowing it and then clock out, and on the
8 way out, they will drop their coveralls in the baskets,
9 right?
10 A. I would say the majority of the time, yep.
11 Q. All right. Do the maintenance guys ever wear gloves?
12 A. Mostly leather gloves if they're doing any type of
13 work with sharp instruments or stuff like that.
14 Q. Are those issued by the company?
15 A. Yes.
16 Q. Where would they get those?
17 A. Right in the maintenance shop, I have some in my
desk,
18 or down in the parts cage.
19 Q. Why hasn't the company documented or made lists or
20 anything of what safety gear a maintenance worker should
21 use for each particular kind of job, why not do that in
22 some sort of written form?
23 A. It is in written form now. There was a time, possibly

around a couple years ago, that -- when I took the position as supervisor, I couldn't locate any documentation on that.

Exhibit 13

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, et al.,	)
Plaintiffs,	) Docket No.
	) CV-00-371-P-C
vs.	)
BARBER FOODS, INC.,	)
d/b/a BARBER FOODS,	)
Defendant.	)

30(b) (6) DEPOSITION of BARBER FOODS, INC. (Thomas A. Page), taken pursuant to notice dated July 12, 2001, at the Law Offices of William C. Nugent, 75 Pearl Street, Portland, Maine, on August 13, 2001, commencing at 10:15 A.M., before Lisa M. Stiles, Registered Professional Reporter, a Notary Public in and for the State of Maine

[page 71]

A. Yeah, it's my expectation that items that are given out would be checked off, yes, either outgoing or incoming.
Q. What I mean to say is: As between, say, Sharon Jenkins and Helen Lamphier, either of them could check out those articles?
A. Yes. And if one of those two ladies were absent, somebody would be handing them out in their place.
Q. Okay. Now is there typically a line at the cage --at the start of a shift to get some -- to obtain these items from the cage, not just these items, but also the more routine items such as the hair nets and the gloves?
A. It depends. Two or more people would constitute a line. Usually there is no more than two or three or four people traveling by. You typically don't have large crowds there at the window.

16 Q. How do you know that?
17 A. I pass through on a pretty regular basis.
18 Q. Well, do you -- what do you do at the beginning of the
19 shift, how do you get ready for the start of the shift?
20 A. I have a series of meetings which I attend. They
21 typically start at 2:45 and we do a prep meeting, getting
22 an overview from first shift on any issues or information
23 that I would need.
24 Q. And who do you meet with typically?
25 A. I meet with my counterpart on first shift, my two
[page 88]
1 MR. WHITTIER: I can testify. I work with the
2 numbers all the time.
3 Q. Okay. We will hold off on that for a bit. Now in the
4 cage -- at the cage, is there -- is it just one open window
5 or are there two windows, one for each person in the cage
6 or--
7 A. There is one large window.
8 Q. Okay. And when there is -- when there are
9 employees -- when there is a number of employees there,
do
10 they generally line up in order to get to the window to
11 receive their equipment?
12 A. The associates pass by the window in a -- I would call
13 it a thin screen. They don't all go at once. Some people
14 have a tendency to want to be earlier than others. If you
15 walk by, it would be typical to see two or three people,
16 perhaps, passing by. Sometimes they don't even break
17 stride. And bear in mind there are two ladies at the
18 window, it's relatively wide, both handing out items.
19 Q. Okay. So it's your testimony that there's hardly ever
20 more than two or three employees --
21 A. I'm sure there are at times, I'm sure there are
at
22 times, but when I walk by, it's -- you have like a thin
23 person stream that is just constantly going by and you
24 might see three or four people backed up at the window,

but
25 they walk by in a pretty regular fashion.
[page 99]
1 period may go on as long as three weeks. Two weeks would
2 be typical.
3 Q. Okay. During that process, they're showing them how
4 to use the-
A. Absolutely.
6 Q. This is one of those where you knew what I was going
7 to say. The personal protective equipment and the
8 sanitation clothing?
9 A. Yes, that's correct.
10 Q. Under what circumstances, during a work shift, are
11 hourly wage employees required to clock out or otherwise
12 not compensated?
13 A. At the end of the shift, they will clock out as
14 they're leaving the production floor. Now while there are
15 many clocks, they just punch out on their way out.
16 Q. Do they punch out at the same clock that they punched
17 in on?
18 A. No, typically not, unless the clock is programmed to
19 do so. At the top of the stairway, there's an out clock,
20 and at the top of this stairway, there's an out clock, and
21 the associates typically punch out on clocks that are
22 stationed as they're leaving the floor.
23 Q. Okay. There are only two out clocks?
24 A. We can -- there are two clocks that are always set for
25 out. We can set additional ones as needed.
[page 100]
1 Q. Okay.
2 A. Two are set all the time, I believe.
3 Q. But typically, all the employees clock out on those
4 two clocks?
5 A. Primarily those two.

6 Q. Okay. All right. Now is there any circumstances
7 during the course of a shift in which employees are
8 required to clock out?
9 A. Only when they are -- only when they are finished
10 work. When they leave the production floor with no
11 intention of coming back, that's when they punch out.
12 Unless -- second shift is a little different than first
13 shift because, typically, we don't have people leaving,
14 punching out, and then coming back to say go see a
lawyer
15 or something of that nature because usually working hours
16 are over for professionals at that time.
17 Q. I wish that were true.
18 A. It's possible that somebody could leave and go --
19 Q. May be a doctor.
20 A. But it's possible that an associate had spoken to
21 their lead and say, gee, I have got an aunt coming in from
22 New York, I need to go home for two hours. They would
23 punch out. Then when they come back, they would – and
24 they would use an out clock. And when they came back,
they
25 would punch in in the area where they would be returning.
[page 102]
1 one of them right there.
2 Q. I will ask Mr. Bickford. But when an employee has to
3 go see the nurse during a shift, do they clock out?
4 A. No.
5 Q. Okay. They do that on the clock?
6 A. They just go.
7 Q. Is it regardless of the reason?
8 A. If they need to see the nurse, it shouldn't really
9 make any difference, I wouldn't think.
10 Q. Well, I mean, are they permitted to leave during the
11 course of the working time other than during their meal
12 break or rest break?
13 A. Sure, I mean they might very well be set up to go see
14 the nurse at 5:30, for example.

15 Q. From whom -- who sets it up, from whom do they have to
16 get permission to see the nurse?
17 A. The crew lead.
18 Q. The crew lead?
19 A. Or their line lead. I'm going to use the generic
20 term, from their supervisor.
21 Q. Okay. I take it they do not typically -- you do not
22 typically make that arrangement?
23 A. No, the person to whom they report makes the
24 reservation.
25 Q. Okay. Do you know whether or not the leads generally
[page 103]
1 require employees to see the nurse -- if they have to see
2 the nurse, that they require them to do it during their
3 meal breaks or their rest breaks rather than during
4 production time?
5 A. Typically, if, for example, it occurs in their rest
6 break, which it could, if that's the only open slot, we
7 would typically give them the extra time. And typically,
8 we do not -- lunch falls later for us, lunch doesn't begin
9 until 7:00 o'clock, so that my associates would not be
10 seeing the nurse at lunch time.
11 Q. Because it's too late?
12 A. The nurse is gone at 6:3 0. And as a practice, we
13 don't make appointments, I don't believe, on first or
14 second shift during lunch hour.
15 Q. All right. Okay. Do you know how much time it takes
16 for production employees, typically, to -- how much time
17 prior to the beginning of their reporting -- well, let me
18 ask you this first. Strike that.
19 For the second shift which starts at 3:45,
20 setting aside the one line that starts a bit earlier now,
21 in order to be ready -- the 3:45 P.M. start time, is that
22 the time when the chicken products start rolling on the
23 line and employees are supposed to be ready to perform
24 whatever work function they have at the beginning -- at

25 the -- whatever function they have with respect to the
[page 115]
1 and so forth. I find them equally vocal.
2 Q. So you don't believe it's true that the Vietnamese and
3 the Cambodians and the Laotians are generally very
hesitant
4 to register any sort of complaint to the company?
5 A. People that want to come to my office, I can think of
6 many different nationalities, and I don't see a lack of
7 Vietnamese or Cambodians and so on and so forth. It's not
8 as though native-born American associates are the only
9 people that come see me, absolutely not.
10 Q. When an employee does go to either the medical office
11 or to the restroom during the course of a shift, do they
12 swipe their card or not?
13 A. No, they do not.
14 Q. All right. Now when they go to the restroom, though,
15 they do have to remove their sleeves and their rubber
16 gloves and the cotton liners and their lab coat?
17 A. Yes.
18 Q. And the hearing protection?
19 A. Well, that's up to them whether or not they take the
20 hearing protection and their hair net off. To me, I would
21 say that's irrelevant.
22 Q. But they are required to take off what?
23 A. Definitely have to take your coat off. You must hang
24 that up on a hook on the outside of the door.
25 Q. And definitely have to take off --

Exhibit 14
Deposition of: Helen Lamphier -- 8/15/01.

1.IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MAINE
3
4
5 ABDELA TUM, et al.,)
6 Plaintiffs) Civil Action Docket
7 v.) No. : CV-00-371-PC
8 BARBER FOODS, INC.,)
9 d/b/a BARBER FOODS,)
10 Defendant)
11
12
13
14 DEPOSITION OF HELEN LAMPHIER, taken pursuant
15 to notice dated August 9, 2001, at the law offices of
16 William Nugent, 75 Pearl Street, Portland, Maine, on
17 August 15, 2001, commencing at 10:11 a.m., before
18 Jennifer A. Ridenour, a Registered Professional
19 Reporter, a Notary Public in and for the State of Maine.
20
21
22 APPEARANCES:
23 TIMOTHY B. FLEMING, ESQ., and
24 CHARLES R. DIXON, ESQ., FOR THE PLAINTIFFS.
25 GRAYDON G. STEVENS, ESQ., FOR THE DEFENDANT.

[page 31]
1 Q. What do you mean by it starts getting busy at
2 three?
3 A. Busier. More steady coming to the window.
4 Q. Can you explain a little bit more what you mean by
5 steady?

A. Well, they're coming to pick their things up. I have to stand by the window.
Q. Okay.
A. You know, you don't go and sit down because they're coming. If I went to sit down, then there would be somebody else right there.
Q. Okay. And when it's -- when it's busier, how many employees are waiting to collect their equipment from the cage?
A. Oh, there could be eight or ten.
Q. And which way -- well, maybe you can show me on Exhibit 4, which is the production floor --
MR. FLEMNG: That's not Exhibit 4. It's just Diagram 4. We didn't put them in as exhibits.
BY MR. DIXON:
Q. Diagram 4. Is the cage on the production level or is it on the lower level?
A. Lower level.
MR. FLEMING: Diagram 3.
BY MR. DIXON:
[page 34]
MR. FLEMING: No. The way that they line up, don't you mean?
THE WITNESS: Where they're lined up near the window?
MR. FLEMING: Right.
THE WITNESS: It's right along here.
BY MR. DIXON:
Q. And when it's busy, they always line up in that direction?
A. Yes. They all come from this direction around the corner.
Q. And when it's busy, how far back does the line go?
A. I have never seen it back as far as the lockers yet.
Q. So how many -- how far would you -- would you say it typically is when it's busy at the cage? How far is

17 the line when it's busy at the cage?
18 A. Maybe eight feet.
19 Q. Eight feet. How many people do you think that is
20 in that eight-foot line?
21 A. There aren't many at a time. It seems like they
22 get in their coats. Some will come up and then they'll
23 go back and get their coat. Seven or eight.
24 Q. Seven or eight people?
25 A. Yeah. I guess.
[page 80]
1 Q. The liners are outside. They pick up their
2 gloves. Okay. Now, when the next face appears at the
3 window, how long does it take you to grab those three
4 items, or four if the beard cover is necessary, and get
5 it to that person and then that face disappears?
6 A. Maybe four seconds.
7 Q. Now, the setup operators who have to actually
8 check out equipment, I take it for you working in the
9 cage, from the time you work it's the setup operators
10 for the second shift that check out with you, right?
11 A. Yes.
12 Q. Check out equipment?
13 A. Yes.
14 Q. And it's the setup operators from the first shift
15 who bring the equipment back, right?
16 A. Yes.
17 Q. Let's do the check-out first. I mean, the
18 typical -- I mean, if somebody comes up and says -- you
19 know, any setup operators comes up and says, I want, you
20 know, these two poucher numbers and a metal detector --
21 A. Stick.
22 Q. -- stick, can you give me a typical time frame
23 that it takes you to get that stuff and hand it to them
24 and they're off and on their way?
25 A. It's right there. Like that.

Exhibit 15

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, et al.,	)
Plaintiffs,	) Docket No.
	) CV-00-371-P-C
vs.	)
	)
BARBER FOODS, INC.,	)
d/b/a BARBER FOODS,	)
Defendant.	)

30 (B) (6) DEPOSITION of BARBER FOODS, INC. (Peter H. Bickford) and PETER H. BICKFORD, individually, taken pursuant to notice dated July 12, 2001, at the Law Offices of William C. Nugent, 75 Pearl Street, Portland, Maine, on August 14, 2001, commencing at 1:45 P.M., before Lisa M. Stiles, Registered Professional Reporter, a Notary Public in and for the State of Maine.

[Page 72]

do remember a discussion with Mr. Whittier and Mr. Page and
myself.
Q. Okay.
A. And I said, one-and-a-half minutes, but I was including putting on that stuff and getting to the time clock is the discussion that I recall.
Q. Okay. And what was your one-and-a-half minute estimate based on?
A. Having been a production worker, I was a keel boner back in '79. I will admit, in those days, I didn't wear gloves. I still don't when I go to the production line. But we wear hair nets and I go to the production areas at least three times a week, myself, and I have to put on my

14 coat, my hearing protection, my hair net, put rubbers on
15 because I don't have treads on my dress shoes, typically.
16 And my office is outside the building and I can certainly
17 be on the production floor in less than a
18 minute-and-a-half.
19 Q. Now when you do it, do you have to go by the cage?
20 A. Yep, that's where I get my hair net and my hearing
21 protection.
22 Q. Okay. But you don't do it at the beginning of the
23 shift when all the other workers are trying to get their
24 stuff'?
25 A. Sometimes.
[Page 73]
1 Q. Do you get in line?
2 A. There's no line to get in, but I walk up to the window
3 and get what I needed.
4 Q. I have a few more questions about that, but also,
5 while I have your attention on the meeting or the
6 discussion with Mr. Page and Mr. Whittier, do you
remember
7 what they said on this subject?
8 A. There were a number of numbers or a variety of
numbers
9 tossed around. I heard two to three minutes and that
would
10 include if you had to change your footwear and times
talked
11 about at the window of anywhere from a second to
seconds.
12 And that's my experience. I frequently - - frequently may
13 be too much. On many occasions, I take tour groups
14 through -- these are people who are not familiar with our
15 clothing standards and I get my own equipment and theirs
16 and lead them to the production floor.
17 Q. How long does it take you when you do that?
18 A. Depends on how many I have to equip and instruct

them
19 about rolling the ear plugs between their fingers and
20 inserting them and so forth, but it takes very little time.
21 Q. Okay. Very little is a relative term. Do you know
22 how much time it actually takes?
23 A. 10 seconds each person.
24 Q. 10 seconds for each person?
25 A. Uh-huh.
[Page 74]
1 Q. Is this like an estimate or have you ever timed it?
2 A. Well --
3 Q. I can't imagine you have actually timed it.
4 A. No, but I can certainly have four or five people
5 outfitted in under a minute, go to the rack, take the coats
6 off, and say, here is the hair net, put it on. I have to
7 give them a little education about ear plugs each time
8 because they may not be familiar with it, so I do that as a
9 group. They all have them in their hands and I tell them
10 about the decibels and --
11 Q. Okay. Do you remember anything else said at these
12 discussions with Mr. Page and Mr. Whittier?
13 A. Concerning the time that it took?
14 Q. Yes.
15 A. No.
16 Q. Were there any other discussions regarding the time it
17 takes you to put on or take off the clothing, equipment or
18 gear?
19 A. Yes, not with that group, but I have had
discussions
20 with my boss, with Mr. Stevens.
21 Q. Okay. Your boss meaning Mr. Haggerty?
22 A. Yes.
23 Q. Were those discussions privileged or not, do you
know?
24 A. Anything -- anything I discussed with Mr. Stevens, I
25 guess, is.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ABDELA TUM, et al.	)	
	)	
vs.	)	**Case No. 00-371-P-C**
	)	
BARBER FOODS, INC., d/b/a BARBER FOODS,	)	
	)	
Defendant.	)	

PLAINTIFFS' STATEMENT OF RESPONSE TO BARBER FOODS' MATERIAL FACTS

Plaintiffs dispute the following assertions and material facts presented by Barber Foods in its Statement of Material Facts (Numbers correspond to Barber Foods numbering; additional numbers contain other information and refer to other evidence pertaining to the issue of fact in question.).

3.3 The "buffer period" described by Barber Foods, whereby employees may clock in up to six minutes before or after the start of their shift, is not actually put into practice at Barber Foods. To the contrary, employees understand that they must be ready to work at the time their shift is scheduled to begin. Ex. 1, Snow Depo. at 20; Ex. 2, Florendo Depo. at 11. Furthermore, employees understand that they may not punch in six minutes before the scheduled start of their shift. Ex. 3, Mekonen Depo. at 17. Some employees, while required to be ready to work at the beginning of their shift, are not permitted to punch in until several minutes after their' shift begins. Ex. 3, Mekonen Depo at 17-18, 26. Ex. 12, Barber Foods Associate Handbook does not, provide for such a buffer period. Ex. 12, Barber Foods Associate Handbook at

14, 17; Ex. 11, Page Depo. at 104-05; Ex. 10, [page 2] Bickford Depo. at 44. The Handbook also states that "Attendance is the starting point of performance; therefore, it is weighed heavily in performance considerations.". Ex. 12, Barber Foods Associate Handbook at 17. A previous iteration of Barber's employee manual stated that employees had to show up 1/2 hour before the shift to have all gear on. Ex. 4, Levesque Depo. at 13.

4.1 Barber Foods has not submitted credible evidence that its employees are paid for an extra 5 minutes of travel time per break.

4.4 Sanitation associates on the third shift are not paid from punch-in to punch-out. Ex. 22, Howard Answers to Interrogatories 4-5.

5.2 In addition to a lab coat, hairnet and or beardnet, earplugs, and safety glasses, employees. are required to wear some combination of following gear: vinyl gloves, cotton glove liners, vinyl. aprons, sleeve covers, bump hats, back belt, steel-toed boots, raw pants, pelletizing gloves, tool clip, set-up tools, lockout-tagout equipment, hose nozzle, and steel mesh gloves, Ex. 2, Florendo Depo. at 5-9; Ex. 11, Page Depo. at 79. Also, employees may obtain additional' gear, which is not required. by their position, such as cotton glove liners or cold weather jackets to stay warm during the work day, or back belts, aprons, or sleeve covers in order to stay safe and sanitary. Ex. 5, Tum Depo. at 19; Ex. 3, Mekonen Depo at 5-7; Ex. 2, Florendo Depo. at 9-10.

5.2(a) Barber employees must follow USDA and safety rules detailing the manner of their dress, including requirements to wear clean white coats and hair nets in the production area and the prohibition against wearing aprons and or white coats in toilet areas. Ex. 14, Barber 'Foods Employee Handbook at 25; Ex. 12, Barber Foods Associate Handbook at 28.

5.2(b) "We are convinced that the company will be most successful when all associates are working safely in a safe environment." Ex. 14. Barber Foods Employee Handbook at

23. "Safety in what [page 3] we do is as important as anything we do." Ex. 12, Barber Foods Associate Handbook at 25; Ex. ii, Page Depo. at 117. ("anything we can do to make somebody's stay at Barber Foods more pleasant, it's a benefit to everybody.")

5.2(c) "While performing the duties of this job, the employee regularly works near moving mechanical parts and is regularly exposed to extreme cold. The noise level in the work environment is usually loud" Ex. 15, Job Description for Production Worker, at I "Ensures all equipment is sanitized according to State and Federal regulations. . . . Works directly with hazardous chemicals and equipment.... While performing the duties of this job, the employee is regularly exposed to toxic or caustic chemicals. The employee frequently works near moving mechanical part. The employee is occasionally exposed to extreme cold. Must wear protective clothing, eyewear, and earwear. The noise level in the work environment is usually loud." Ex. 16, Job Description for Sanitation Worker at 1-2. "While performing the duties of this job, the employee is frequently exposed to extreme cold. Must wear protective clothing, eyewear, and earwear. The noise level in the work environment is usually moderate." Ex. 17, Job Description for Set-Up Operator, at 2.

5.2(d) Protective equipment such as hair nets, beard nets, and gloves are primarily used to protect the chicken products rather than to protect the employee. Ex. 6, Shaw Depo. at 19; Ex. 2, Florendo Depo. at 26.

5.4 Employees at the supply cage dispense hairnets, beardnets, gloves, earplugs, Scissors, pelletizing gloves, plastic sleeves, aprons, as well as items such as cook codes, metal detector sticks. Ex. 7, Lamphier Depo. at 7, 13-14, 20-22.

5.4(a) The bulk of the employees on second shift show up between approximately 3:00 and 3:30 p.m. Ex. 7, Lamphier Depo. at 30, 36 [page 4]

5.6 Before institution of the cage, in approximately August 1999, employees collected various equipment from bins and racks. Some employees took approximately 2-4 minutes to collect the required equipment and gear, while others had to wait longer than after institution of the supply cage. Ex. 4, Levesque Depo. at 12, 25, 33; Ex. 8, Radovic Depo. at 8; Ex; 5, Tum Depo at 61;Ex.' 2, Florendo Depo. at 6-7. When the cage first opened, it was only staffed by one worker, and the waits to collect equipment were longer than they are now that the supply cage is sometimes staffed by two employees. Ex, 2, Florendo Depo. at 55-57.

6.1 In addition to the gear listed by Barber Foods (Ex, 13, Barber Foods Statement of Fact at 7), some rotating associates are required to wear gloves. Ex. 5, Tum Depo. at 10. "Luggers," employees who may lift items weighing up to 40 pounds, are required to wear .a back belt. Ex. 18, Barber Answers to Interrogatories at 2; Ex. 11, Page Depo. at 39-40.

6.2 In addition to the gear listed by Barber Foods (Ex. 13, Barber Foods Statement of Fact at 7-8), set-up operators are also required to have tools, and are required at times to ,wear sleeves, rubber gloves, and or pelletizing gloves. Ex. 2, Florendo Depo. at 9; Ex. 9,•Olszynski Depo. at 5, 9-10.

6.3 In addition to the gear listed by Barber Foods (Ex 13, Barber Foods Statement of Fact at 8), meatroom employees are also required to wear bump hats. Ex; 4, Levesque Depo. at 8.

6.4 In addition to the gear listed by Barber Foods (Ex. 13, Barber Foods Statement of Fact at 8), shipping and receiving employees are required to wear back belts. Ex. 1, Snow Depo. at 13, 24. Because these employees must go through the production floor to punch in, they are required to obtain and put on the same gear as rotating associates. Ex. 1, Snow Depo. At 9-10.

6.7 The requirement that employees utilize various pieces of personal protective equipment is designed to address hazards associated with working at chicken processing plants such as Barber [page 5] Foods. Ex. 19,

Barber Foods Safe Work Field Compliance Manual (sections describing "purpose," and "protective equipment usually considered"). Primarily, however, protective equipment such as hair nets, beard nets, and gloves are primarily used to protect the chicken products rather than to protect the employee. Ex. 6, Shaw Depo. at 19.

6.8 Additional protective clothing, equipment and gear are worn by, employees and these items also benefit the employer. Ex. 11, Page Depo. at 117.

7.3 Employees often do not wear their issued steel-toed boots home but, rather, don and doff these boots every work day. Ex. 4, Levesque Depo. at 8, 11, 21.

8.1 Plaintiffs do not dispute Ex. 13, Barber Statement of Material Facts ¶8. 1. In addition, crew and line leads are responsible for monitoring time punch accuracy and attendance. The leads are supposed to check the computer daily to check associate punches. They also receive a weekly printout of the associates' daily clock punches. The leads are also responsible for monitoring and entering into the computer any time off, such as excused or unexcused absences, arriving late or leaving early, leaves, vacation, paid time off, etc. Ex. 18, Barber Answers to Interrogatories at 5-6.

8.2 There are numerous time punch clocks spread throughout the Barber facility. Employees simply swipe their individual card through the machine, much like a credit card, and the machine registers the punch. Ex. 11, Page Depo. at 11-12, 17, 21.

8.4 Sanitation associates on the third shift are not paid from punch-in to punch-out. Ex. 22, Howard Answers to Interrogatories 4-5.

10.2 While irrelevant to the actual work setting experienced by Barber Foods employees, it takes approximately between 1-2 minutes to walk directly from the building entrance to the punch clock. Ex. 3, Mekonen Depo. at 18-19; Ex. 4, Levesque Depo. at 38. [page 6]

10.3 There often are hues at the supply cage containing from 5 to 20 employees. Typically, an employee at the back of one of these lines takes from 2 to 8 minutes to get to the supply cage to collect his or her equipment. Ex. 5, Tum Depo. at 30-32; Ex. 3., Mekonen Depo. at 11-14; Ex. 9, Olszynski Depo. at 19. During the busier periods at the cage, when the bulk of the employees come to pick up their gear, there typically are 8-10 people in line, and sometimes, there are more than 15. Ex. 7, Lamphier Depo. at 31, 37, 39-42. Whether or not there is a line, delays are caused when the cage employees socialize or otherwise do no pay attention to employees' waiting for their equipment. Ex. 2, Florendo Depo. at 15-16, 56.

10.3(a) When the bulk of the employees come to the cage to get their gear, the area outside the cage is often extremely crowded and busy, with employees and temporary employees waiting to get their gear intermingling with employees fresh off of working on the previous shift walking the opposite direction. Employees often complain about why the line at the cage does not move faster. Ex. 7, Lamphier Depo. at 36, 40, 66-67, 77.

10.3(b) Usually, there are also lines or crowds of people which employees must navigate to get the white coats and glove liners from the racks and bins down the hail from the supply cage. Ex. 2, Florendo Depo. at 13; Ex. 9, Olszynski Depo. at 18. Employees sometimes' have to wait several minutes to get their white coat and glove liners. Ex. 2, Florendo Depo. at 13-15, 21.

10.4 Barber Foods' employees typically require approximately between 8 and 36 minutes from the time they enter the Barber Foods facility to obtain and don the necessary clothing, equipment, and gear, to be ready to punch in and begin their shift. Approximately between Sand 10 minutes,: is spent strictly donning the required gear. Ex. 5, Tum Depo. At 27; Ex 8, Radovic Depo. at 11; Ex. 3, Mekonen Depo. at 11-14; Ex. 2, Florendo Depo. at 21-22; Ex. 9, Olszynski Depo. at 17-2 1; Ex. [page 7] 11, Page

Depo. at 118-19. Some employees were told to arrive at work between 1.5 arid 30 minutes before the scheduled start of their shift. Ex. 24, Lamarche Answers to Interrogatories at 2-3; Ex. 20, Bearce Answers to Interrogatories at 2-3.

10.4(a) There is often a line to punch in to work. It typically talçs between a couple minutes and seven minutes to reach the front of one of these lines and punch in, Ex. 5, Tum Depo at 50-51; Ex. 8, Radovic Depo. at 9-10; Ex. 3, Mekonen Depo. at 11.

10.4(b) Any time employees spend socializing or otherwise using time for their own benefit would be in addition to the time it takes to prepare for the shift. Ex. 9, Olszynski Depo. at 29 ("No, I don't have time [to go to the cafeteria or somewhere else just to socialize or have something to eat: or something to drink].").

10.4(c) Because of the high volume of people traffic, employees must often spend significant amounts of time navigating the hallways between the supply cage, the area where coats and glove liners are kept, their lockers, and the punch clock. Ex. 2, Florendo Depo. at 17-18; Ex 9, Olszynski Depo. at 30 ("Sometimes we have so many people you have to sneak between people.").

10.6 Rotating associates typically spend approximately between 5.and 17 minutes obtaining and donning the necessary sanitary and protective clothing, equipment, and gear. This equipment is typically not donned while walking. Ex. 5, Tum Depo. at 27-29; Ex. 3. Mekonen Depo. at 1.3-14; Ex. 8, Radovic Depo. at 11-12.

10.6(a). Some rotating associates must wait an additional 6-7 minutes at the production area for their supervisor to give the job assignment before they are permitted to punch in. Ex; 3, Mekonen Depo. at 17-18, 26.

10.7 Rotating associates typically do not doff their gear while walking. Some may begin doffing [page 8] their gear while walking from the punch clock, but complete their doffing at the laundry or disposal bins. The crowds of people in the stairwells and hallways make doffing gear while

walking Impractical. Ex 5, Tum Depo. at 46; Ex 8, Radovic Depo. at 13-15; Ex..3, Mekonen Depo at 19- 22:

10.7 (a. Rotating associates must spend between 7 and 12 minutes' after swiping out to doff their gear, launder, throw away, or store this gear, and exit the building. Ex. 3, Mekonen .Depo at 19; Ex. 8, Radovic Depo. at 12; Ex. 5, Tum Depo. at 38-39.

10.8 Set up operators spend approximately from 15 to 20 minutes walking in the front door of the building for set-Up operators to get their white coat, glove liners, and their gear from' the supply cage,' including a wait of several minutes to get a coat and typical wait of approximately between two and five minutes to obtain gear from the supply cage. Ex. 2, Florendo Depo. at 21-22; Ex. 9, Olszynski Depo. at 1,7-21. It takes approximately 2-3 minutes to walk to walk from supply cage to the locker room. Ex. 2, Florendo Depo. at 21; Ex. 9, Olszynski Depo. at 30. It takes another approximately 10 minutes for set-up operators to don their equipment at their locker. Ex. 2, Florendo Depo. at 22-23; Ex. 9, Olszynski Depo. at 25-2 7. It takes another approximately 2-3 minutes to walk from the locker room to' the packout-1 punch clock. Ex. 2, Florendo Depo. at 25; Ex. 9, Olszynski Depo. at 30.

10.9 Prior to punching out, set-up operators return to the cage any items they had checked out earlier. Often, set-up operators must wait for a cage employee to arrive so that they may return these items, which takes approximately 4-5 minutes. On the occasions when there are employees present working at the cage, it takes approximately one minute to return these items. Ex. 2, Florendo Depo. at 41-43; Ex. 9, Olszynski Depo. at 41-42.

10.10 Set-up operators typically doff most of their gear after reaching the bottom of the stairs after [page 9] punching out. Ex. 2, Florendo Depo. at 31, 34. 38. It typically takes set—up operators approximately one minute to doff their white coats. Ex. 2, Florendo Depo at 39-40. There are usually crowds around the bin where white coats are laundered, requiring employees to wait approximately 3 minutes. Ex. 2,

Florendo Depo. at 40. It takes approximately 3 minutes to walk from the cage to the locker room. Ex. 2, Florendo Depo. at 43. Once at the locker, it takes set-up operators at least 5 to approximately 10 minutes to doff and store their gear, and then an additional 3 minutes to walk from the locker room to the exit. Ex. 2, Florendo Depo. at 43-44, 54-55; Ex. 9, Olszynski Depo. at 42-43. The crowds of people in the stairwells and hallways make doffing gear while, walking impractical. Ex. 2, Florendo Depo. at 38.

10.11 It takes meatroom employees approximately 15-20 minutes to prepare for their shift, including approximately 8-9 minutes strictly to obtain and don equipment. Ex. 4, Levesque. Depo. at 14, 25-27, 33 Sometimes, additional waiting time resulted when employees did not have access to the supply area. Ex. 4, Levesque Depo. at 16-20.

10.12 Meatroom employees take approximately 5 minutes between the time they clock until the time they leave the Barber plant, assuming they do not have to wash their boots. The total time between clock out and exit is approximately 10-20 minutes if the meatroom employee has to wash his or her boots. Meatroom employees wash their boots at least half of days worked, because of their heavy exposure to chicken grease. Aside from doffing gloves while walking, meatroom employees typically walk down the Stairs to the first floor after punching out, and then doffing their, gear. Laundry and disposal bins were located at the bottom of the stairs. Meatroom employees punch in and out on the meatroom clock. Ex. 4, Levesque Depo. at 28-30, 35, 37-38 [page 10]

10.13 Shipping and receiving employees spend approximately 15 minutes preparing to perform shift work before their shift begins, including approximately 10 minutes obtaining and donning necessary gear. About once per week, shipping and receiving employees must navigate groups of employees from the previous shift, which adds another 1-2 minutes of pre-shift time. Ex. 1, Snow Depo. at 10, 18-19, 25, 27-28, 30, 37.

10.14 Shipping and receiving employees typically spend between 10 and 12 minutes after punching out to return through the production floor, doff their gear, launder, dispose of or store gear, and go to the building exit. It takes approximately 5-6 minutes just to doff and dispose of, launder, or store gear. Ex. 1, Snow Depo. at 10, 21, 24.

10.15 When maintenance employees enter the production floor, they are required to wear a bump hat, coveralls, back belt, tools, safety glasses, ear plugs, hair net, work shoes or boots, and a beardnet (if the employee has a beard). When maintenance employees are not scheduled to enter the production floor, they are required to wear safety glasses and steel-toed boots. Maintenance employees are required to obtain much of their required gear before clocking in. Typically, it takes approximately 10-15 minutes for a maintenance employee to walk from the entrance of the building, go to a locker, don a bump hat, coveralls, back belt, tools, safety glasses, and shoes, go to the supply area in the maintenance shop, get equipment from the supply area, and double check tools. Ex; 20 Bearce Answers to Interrogatories at 3-4; Ex. 6, Shaw Depo. at 19-20.

10.16 Maintenance employees typically spend approximately. 20-25 minutes taking off clothing, equipment, and gear, putting equipment away in a locker, throwing away or laundering equipment, throw away or launder equipment, and cleaning tools before punching out. Ex. 20, Bearce Answers to Interrogatories at 4. [page 11]

10.18 Sanitation workers must obtain their protective and sanitary clothing, equipment, and gear, — white coat, hairnet, beardnet, rubber gloves, glove liners, sleeve covers, earplugs, safety glasses, hard hat; back belt rain gear, and rubber boots — from the supply cage, the locker, and the coat area, and don this equipment prior to punching in. Ex. 22, Howard Answers to Interrogatories at 3-4.

10.19-10.20 It usually takes sanitation workers 5-10 minutes to put on all the required equipment pre-shift, and approximately 17-22 minutes between entering the building

to having all their equipment on. After punching out, it typically takes sanitation workers approximately 12 minutes to walk to the locker room, doff their equipment, and walk to the exit, including 8 minutes for doffing alone. Ex. 22, Howard Answers to Interrogatories at 4-5.

11.1 - 11.2 Employees at the end of the production line get approximately 4 minutes less break time than employees at the front of the production line, because they, have to 'wait for the product they have to work on before they can leave. Some employees have been denied their full 30-minute lunch break. Ex. 3, Mekonen Depo. at 24-25, 27-28; Ex. 4, Levesque Depo. at 39-41; Ex. 2, Florendo Depo. at 48.

11.3 Barber Foods suggests to employees that they use their lunch break or other break to use the restroom. Ex. 11, Page Depo. at 113. Some employees have repeatedly been denied paid breaks. Ex. 1, Snow Depo. at 33. Some employees' lunch breaks have been cut short, and some employees believe that some of their lunch breaks seem shorter than 30 minutes. Ex 4, Levesque Depo. at 39- 41; Ex. 2, Florendo Depo. at 48. Employees generally spend between 6-10 minutes — sometimes significantly more — of their break time doffing, walking to and from the break area, and redonning 'their equipment. Ex. 22, Howard Answers to Interrogatories at 4-5; Ex. 21, Carey Answers to Interrogatories at 4; Ex. 24, Lamarche Answers to Interrogatories at 4-5. [page 12]

12.2 - 12.5 Members of management — specifically, Zareh Derhagopian and Doug Goodwin — have "recommended" that employees visit the nurse's office during lunch break. Ex. 4, Levesque Depo. at 42. Employees on second shift typically must visit the nurse before their shift begins and before they clock in. Employees are not paid for the time they spend waiting for and visiting the nurse. Ex. 5, Tum Depo. at 52-53; Ex. 9, Olszynski Depo. at 47-49; Ex. .23,. Huntley_Answers to Interrogatories at 3.

13.1-13.2 Barber Foods is, and should be, aware that its policies concerning pre-shift and post- shift activities, meal

breaks, and medical appointments complained of by the plaintiffs failed to comply with the Fair Labor Standards Act. Peter Bickford's attendance at seminars and his review of periodicals dealing with employment law issues, including wage-and-hour matters, is or should. have indicated that Barber Foods' wage and hour policies are not in compliance with the law. (13, Barber Foods Statement of Fact at 19-20).

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Exhibit 1

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, et al,	*
	*
Plaintiffs,	*
	*
V.	*
	*
BARBER FOODS,	*
	*
Defendant.	*

DEPOSITION of KEVIN SNOW, was held at the law offices of Kelly, Remmel & Zimmerman, 53 Exchange Street, Portland, Maine, on October 23, 2001, before Carla Culver, a Notary Public in and for the State of Maine.

APPEARANCES:

For the Plaintiffs:	Charles Dixon, Esq.
For the Defendant:	Graydon G. Stevens, Esq.

[Page 9]

1 help out in the cooler, then I had to wear the blue ones.
2 Sometimes if a -- you know, it depends how much chicken
3 they had to stack in the cooler cause a pallet fell over
4 or something, you know, it all depends.
5 Q So unless you were on the production floor, am I correct
6 that the items that you had to wear when you were not on
7 the production floor were steel-toed boots, a bump hat and
8 a back belt?

A Primarily, yes.
Q Was there other stuff that you would normally on a typical
day wear to work at Barber Foods in shipping and receiving
not associated with the times that you went onto the
production floor? Do you understand what I'm saying?
A No.
I'm trying to figure out -- if you had a day in dry goods
when you never went on the production floor, you come to
work, you come to work in dry goods, and you never get
sent to the production floor so you don't have to put on
the lab coat or the hairnet or that stuff, what do you
have to put on on your normal typical day other than your
steel-toed boots, your bump hat and your back belt?
A What about regarding punching in and out?
But that's not putting something --
A But the time clock for shipping and receiving is on the
production floor.

[Page 10]

Q So you would actually have to put on a lab coat, a
hairnet, --
A Earplugs and hardhat.
Q -- and earplugs every day in order to go and punch in?
A Yes.
Q And then go and punch out?
A And then you'd go back -- and then to punch out, correct.
Q Maybe the best way for me to approach it then is to --
let's start your typical routine from the time you get
there in the morning --
A Okay.
Q -- until you're all punched in and go to wherever you're
going to go work, and then I'll go back and cover what
you're wearing all this time, okay?
A All right.

16 Q So what would be your -- how did you arrive at work; did
17 you walk or bring a car or what?
18 A I drove to work.
19 Q You drove to work. And what was your shift?
20 A Roughly 5 a.m. to 3:30 p.m.
21 And where did you park, out back?
22 A Yeah, I usually parked down by dry goods cause I had a key
23 to let myself in.
24 Oh you did, okay. That was going to be my question. Is
25 dry goods on the first floor or the second floor?
[Page 13]
1 Q Did they move them to the regular locker room where
2 everybody else's lockers were?
3 A Yes.
4 Q And approximately when was that, do you know?
5 A I can't remember exactly. It was before I left, probably
6 about six, seven months before I left.
7 Q In any event, whether your lockers were at the old area in
8 dry storage or in the locker room with everybody else,
9 your typical routine I take it was to come in through that
10 entrance and go to your locker?
11 A Yes.
12 Q And get what?
13 A A hardhat and back belt.
14 Q And what would you do with them?
15 A I'd put them on.
16 Q Right away?
17 A Then I'd go all the way to the back of dry goods and grab
18 -- find a lab coat. So I'd walk all the way down here.
19 And did you have lab coats in dry goods?
20 A They're in dry goods, yes.
21 What were they, on a rack?
22 A On a rack, yeah.

23 And then what did you do?
24 A And then I'd go over here and start coming upstairs and go
25 up and around up here to the first floor, walk to the
[Page 18]
1 put anything on, you didn't have to go in your locker and
2 put the steel-toed boots on, you didn't have to put the
3 coat and the hairnet and earplugs on, but you still had to
4 come over to where you normally punched in at the time
5 clock in shipping and receiving, how long typically would
6 it take you from walking through the door to just come up
7 and go to shipping and receiving and punch in, do you
8 think?
9 A Just to walk straight here, --
10 Q Yeah.
11 A -- go up, punch in?
12 Q Walk up and punch in.
13 A Five or six minutes.
14 Q And now adding what you actually did, which is go over to
15 your locker and put that stuff on and then go over and get
16 your, you know, to the rack and put your coat and your
17 hairnet and earplugs on and then go up, typically how long
18 would you say it took you from the time you entered until
19 the time you actually punched your clock?
20 A Well, combination lock on the locker, steel-toed boots, I
21 gotta' take my boots off, put 'em in, take my sneakers
22 off, put 'em in the locker, lock it back up. You mean
23 overall going up there and then going up to punch in?
24 Yeah.
25 A I'd say about ten to fifteen minutes.
[Page 19]
1 Q And refresh me cause I think I lost what you said just the
2 walking would take you if you could walk direct.

A Five or six.
Q Five or six, okay.
Say you'd add about ten minutes to that.
So you think getting the stuff that you had to get and putting it on and taking the detours that you had to take, you think it probably adds approximately ten minutes to that?
A Yeah. About five or six minutes just changing my sneakers into my boots, you know, and then walk down there is a minute-and-a-half, two minutes, and then I gotta' g halfway back up to dry goods and then go all the way up for the five and six minutes, so --.
And what did you keep in your locker?
A My hardhat -- you mean everything, even the little things?
Well the stuff that you actually had to put on every day when you came to work, you know, what type – as opposed to personal stuff, yeah.
A Well, I'm not talking personal stuff, I'm talking work stuff, you know, like magic marker, pens, thermometer -- well I didn't need a thermometer down in dry goods, but, you know, I had a taper and -- a lot of times my timecard was in my locker.
But the stuff that you had to get from your locker in
[Page 20]
order to get upstairs and punch in shipping and receiving would be your--
A Hardhat.
Q Hardhat, steel-toed boots, --
A Steel-toed boots, back belt.
Q And back belt. Actually, you know you'd have to wear the lab coat and the hairnet and the earplugs to go upstairs and punch in, right?
A Um-hmm.

10 Q But why did you have to put steel-toed boots, a hardhat
11 and back belt on first?
12 A Well if -- because I had to be ready to work as soon as I
13 punched in. I had to be ready to work. That means --
14 Who told you that?
15 A That's what I was told when I first started working
there.
16 Did anybody in shipping and receiving come in and just
17 on their coats, hairnets, earplugs, go up and punch in and
18 then come back down and throw their boots on and
hardhat?
19 A Not as far as I know, cause you had to be ready to work
as
20 soon as you got there. As soon as you punched in you got
21 -- you know, like if I was a runner, when I was running I
22 was actually running mostly for dry goods, okay, I'd run
23 stuff off the elevators, okay.
24 Yeah.
25 A And I would go in and I'd get all my stuff on, plus I had
[Page 21]
1 to have a warm coat, you know, a freezer coat pretty
much.
2 And I'd go up -- I'd get all that stuff on, go up, punch
3 in, I'd go in and grab the radio cause we had a radio
4 system for a while, and you know, even though I. wasn't
5 ready to work right away the radio was in the office, so,
6 you know, I had to wait to get that anyway.
7 Q Now were there any occasions -- did you punch any
other
8 clocks during the day before you punched out?
9 A What--
10 Q You come over here to the shipping and receiving time
11 clock to punch in at the beginning of your shift, right?
12 A Um-hmm.
13 Q And then did you punch out at the same clock --
14 A Yes.
15 Q -- at the end of the shift?

16 A Yes.
17 Q During the shift did you -- were there occasions where you
18 would punch the clock or any other clock?
19 A For a short time, but this was before '97, they said you
20 could punch out on any clock, but then they changed that.
21 So in other words --
22 A After '97 they didn't allow that any more. You had to
23 punch out the same clock you punched in on, except the
24 production. Production was any clock, but shipping and
25 receiving, they wanted us on the same clock.
[page 22]
1 Q Okay.
2 A I think the meat room and all those were all the same
3 clock, specific departments.
4 Q But there was -- so there isn't any occasion — I mean
5 like if for example we heard with production workers if,
6 you know, when they rotate the lines, in order to keep
7 track of where the laborer is going they'll swipe cards
8 during the day.
9 A Right.
10 Q It doesn't punch them off the clock, but they swipe to let
11 them know where they are. Did you guys at shipping and
12 receiving do anything like that?
13 A Only if we were leaving the premises.
14 Q Okay.
15 A Only if I was going off the property for lunch, they'd
16 make me go -- I'd go out to the production floor, punch
17 out, and then, you know, go take my stuff back off, go to
18 McDonald's, come back, put my stuff back on, go back and
19 punch in, punch back in for lunch.
20 Because you always had to use this one?
21 A Always had to use that clock.
22 Now at the end of the day, what was your routine?
23 A I would go up and punch out if I was done. Like I said,

my hours were a little flexible. If I had an hour—and-a-
half for the end of the day that was nobody coming in,
[Page 24]
Q And do you still have your bump hat on?
A Usually I'd put my hardhat on. Basically, I don't know,
it was just the common thing to do would be tie your
earplugs to your hardhat, so then you don't lose your
earplugs.
Q Did you still have your back belt on --
A Yes, back belt --
Q -- typically when --
A -- you're supposed to wear all the time.
Q Okay.
A Whether you use it or not.
Q Okay.
A But it had to be on you or else you got written up.
Q Well let me ask you, from the time that you actually
punched out then, you know, you'd swipe your card out
here
in the office, until you left the door, opened the door
and walked out and you're a free man again, typically
how
long would that take?
A Well, the walk itself is five minutes, five, six minutes,
like I said. Probably about -- taking stuff off is easier
than putting it on, obviously, so I'd say another five or
six minutes added onto the walk, so ten, twelve minutes.
So you think it's, what, four or five minutes quicker from
the clock out the door at the end of the day than it is
from the door to the clock at the beginning of the day?
[Page 25]
A Well, --
Q Use your best estimate.
A -- I would say yeah because, you know, if you're going
to
need a lab coat, you have to find one that fits. I mean
90 percent of the people there are 5-foot-6 or less. I'm

6-foot-4, I had to get a big coat. So, you know, I'd have to look for a coat that would fit me and toss it on rather than, you know, but at the end of the day I'd just take it off, throw it in the bin, you know.

Q And I know we're really parsing stuff here pretty finely, but you know, for example, can you give me your best estimate, how long does it take you to -- how long does it take you to take your lab coat off when you decided -- I'm not talking about the walking time or anything, just to take your lab coat off and throw it in the bin?

A Well, usually my lab coat's off by the time I hit dry goods because I can just walk over there and toss it in. That's why your time lapses, I can't take it off until I get down here.

So at the end of the day when you swipe out, you've got to keep it all on as you walk through production to the stairwell, right?

A Yeah.

And as soon as you get out of production, you can actually take your coat and your hairnet and your earplugs off.

[Page 27]

bin, and then the bin would be there, I'd toss it in, then I'd walk down and, you know, take my -- to open my locker, take my sneakers out, change into my sneakers, put everything in.

Q Now the same -- in the morning, did you generally do that in reverse in the morning when you'd come in? When you grab your coat and your hairnet and your earplugs, on a typical day, just as soon as you get those, you're heading for the stairs to get up to production to go punch in, right?

A (Pause)

Q In other words, you come to your locker first?

A Um-hmm.
Q And then you go to the -- over in the area of the cage where the racks were for your coat and your hairnet and your --
A Right.
-- earplugs?
A Usually everything would be in my hardhat, you know, like I said, my marker, my taper, stuff like that would be in my hardhat. So I'd carry it down there, I'd grab the hairnet, throw that on, grab a lab coat, look for a lab coat that fit, you know, put that on, my back belt would already be on, and I'd throw my stuff in and walk upstairs and punch in.

[Page 28]

Q That's what I was getting at. At the end of the day once you get off the floor and you hit the stairwell, you're basically getting your coat off and taking your hairnet and your earplugs off, so about the time you hit the bin and threw them away downstairs, you've already got them off and then it's just a question of there's the laundry bin, bang, there goes the coat, there's the trash, there goes my hairnet and earplugs. Right?
A Um-hmm.
Q At the beginning of the day when you pick up your and hairnet and coat, do you do that in reverse, sort of, well I'm on my up to --
A Pretty much.
Q -- so while I'm walking up towards the stairwell towards the floor, I'm putting my coat on, putting my hairnet on, putting my earplugs on?
A No, usually if I grab my lab coat I put that on.
Right there?
A Right at the -- where the coats were. I mean it was -- it's -- I mean cause I'd still have to take my stuff out of my hardhat, so I'd have to set my hardhat down in

order
22 to put my coat on. I really can't, you know, hold it at
23 the same time. So I'd just put my coat on, and then as I
24 -- and I'd have to put my hairnet on because it's a two
25 hand thing, I mean I don't know how -- if you ever put a
[Page 30]
1 A I didn't. Well like I said, at that time there were very
2 few people there. A lot of times -- sometimes third shift
3 would be in my way cause they'd be coming down to
break
4 right around then, and they'd come through, you know,
5 twenty-five people, whatever, they'd be filing through
6 this door. And they actually take -- a lot of them take
7 their stuff off cause it's too hot, cause they wear a lot
8 of stuff. So they take their stuff of f, and I'd have to
9 dodge some of them sometimes. But other than that, I
10 could just go and do it.
11 Q What did you -- what type of breaks -- what was your
12 normal break schedule during a shift?
13 A Usually I'd take a fifteen-minute right around 8
o'clock,
14 8 a.m.
15 Q That was paid, right?
16 A Yeah, didn't have to punch out for that.
17 And what was your next break?
18 A Lunch, that was whenever convenient. I didn't have a
19 schedule.
20 You didn't?
21 A No, not for lunch because if I'd try to take it at noon, a
22 truck would come in, and I've got to unload it and enter
23 it into the system, things like that. So they
24 automatically deducted a half-an-hour at any given time
so
25 I could take my break, you know, I could take a lunch
[Page 33]
1 punch out and punch back In, and try to make sure you're
2 within one or two minutes of a hair-an-hour or else you

get hell for it.
Q So they still -- the company -- did you often leave the premises for lunch or whatever?
A Not usually, really.
Q But on those occasions when you did, the lunch -- the half-hour deduction was made automatically?
A It was made automatically, but if I punched in and punched out they wouldn't do the half-hour deduction, so that was --
Q So they would rely upon whatever your punch in and punch out was?
A Exactly.
Q And did you have any other breaks during the day?
A We were supposed to have a ten-minute at the end of the day, but I never usually took that or never usually got that. Usually if -- usually I would get -- like Thursdays I'd never get it because I was expecting a guy, University Rubber, every week. And usually sometimes a label guy would come in late. He always came in late and drove me nuts, but --. I probably got it twice a week. Three times a week I probably didn't, or vice-versa. You know what I mean, sometimes I'd get it three times a week, you know, just depending. But that was the nature of the job,

[Page 37]

before?
A I think I have.
Q And have you put together answers to that yet?
A Yeah, I filled one of. these out before, I believe, and mailed them in, put them in yellow envelopes.
Q So you've already supplied your answers to those?
A Yes, I believe I have.
MR. STEVENS: That's all I've got.
THE DEPONENT: That's it?
MR. STEVENS: Yeah.

MR. DIXON: I just have a couple things.

EXAMINATION BY MR. DIXON:

You mentioned sometimes there were people from third shift that --

A Were in my way?

Q -- were in your way?

A Yeah.

Q How often did that happen?

A Oh, maybe once a week or so. Not much.

And where --

A Usually we would bump into each other when I'm going up and they're coming down, or when I'm down – sometimes they're already down there. Some of them took their breaks right there just to go down and rest, just to hang out by the lab coats.

Exhibit 2

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, et al,	*	
	*	
Plaintiffs,	*	
	*	CIVIL NO. CV-00-371-P-C
V.	*	
	*	
BARBER FOODS,	*	
	*	
Defendant.	*	

DEPOSITION of CELSO FLORENDO, was held at the law offices of Kelly, Remmel & Zimmerman, 53 Exchange Street, Portland, Maine, on October 25, 2001, before Roxanne DiMarco, a Notary Public in and for the State of Maine.

APPEARANCES:

For the Plaintiffs:	Charles Dixon, Esq.
For the Defendant:	Graydon G. Stevens, Esq.

[Page 5]

1 A Um-hmm.
2 Q –there's--and I'll go through everything in a minute, but
3 right now, for example, you have to get hairnets and
4 earplugs and rubber gloves, anyway, you have to get from
5 the cage--
6 A That's correct.
7 Q --every day, right? Now you didn't always have to do
8 that, right?
9 A I couldn't get it. Kind of like--Can you repeat it again?
10 Q Yeah.

A Please.
Q Right now--
A Um-hmm.
Q --you have to, at the--there may be some other things, but
at least you have to get like a hairnet and earplugs and
the--and the rubber gloves, you have to get out of the
cage every day, right?
A Correct.
Q Okay. Now that has not always been the case, right? The
cage hasn't always been there, right?
A You mean before.
Q Right. There--the cage hasn't always been there. In
other words there were--before there was the cage they had
the hairnets and the earplugs out in--in racks or bins
out--out where people could get them without having to go
[Page 6]
to the cage to get them, right?
A That's correct.
Q Okay. Do you--do you have any sense of, you know, an idea
as to when that switch was made where they actually put
the cage in and you had to go to the cage for those items?
A I could not remember the date.
Q Okay. Let me ask you, without trying to put a time on it,
the time that you say that you have to wait every day to
get all your stuff and wait in line and put it on before
you can go upstairs and--and actually punch in, do you
think it's longer since they put the cage in or shorter
since they put the cage in? Or about the same? I mean I
suppose--
A I couldn't really put the date down, you know.
Q No, yeah, I'm not talking about the--
A Yeah. Um-hmm.

17 Q --date the cage was in, I'm just saying, I take it--and--
18 and once again, don't worry, we'll get into specifics, but
19 I--I take it that one of your claims in this case is--is
20 that you--you spend a lot of time before you actually
21 punch in standing in line to get materials and putting
22 those things on before you can actually go upstairs to
23 punch in, right?
24 A That's correct. Um-hmm.
25 Q Okay. And what I'm trying to find out from you is--is
the
[Page 7]
1 time that you claim you have to do that, was that longer--
2 has that been longer since they put the cage in or shorter
3 since they put the cage in?
4 A There were time that it's longer, because you have like
5 the temporary, when they comes in, you (Indiscernible) up,
6 yeah.
7 Q Okay.
8 A (Inaudible).
9 Q Now I've got a list and I want to make sure I--I go
10 through to know where you--what you actually have to
wear
11 every day before you go up on the production floor and go
12 to work, okay?
13 A Mmm.
14 Q You have to wear a white coat, right?
15 A Correct.
16 Q And a hairnet?
17 A Correct.
18 Q Do you--do you wear rubber gloves every day?
19 A I usually pick them up in the window.
20 Q Okay. So-
21 A Every day.
22 Q --you usually do-
23 A Yes.
24 Q --pick up rubber gloves.
25 A Right.

[Page 8]
1 Q Okay. Do you wear the cotton liner? The white gloves?
2 A Yes.
3 Q Okay. So you--is it--is it normal for you to wear both
4 sets of gloves every day?
5 A Yeah, usually, because sometimes you have to help ti e
6 people when they're working on the (Indiscernible)
7 machine, because sometimes they're very slow.
8 Q Okay. Do you wear an apron?
9 A No, I don't.
10 Q Do you wear sleeve covers?
11 A You mean the white--
12 Q The--the--yeah, the little pull-on sleeve covers.
13 A No, I don't.
14 Q As a set-up operator I take it you have to wear the steel-
15 toed boots?
16 A That's correct.
17 Q And you have to wear earplugs.
18 A Correct.
19 Q Do you have to wear safety glasses?
20 A Correct.
21 Q Do you wear a back belt?
22 A Correct.
23 Q And do you wear a bump hat?
24 A Correct, yeah. That's the hard hat. That's not-
25 Q The hard hat, yeah.
[Page 9]
1 A Um-hmm.
2 And you--do you have to have a lock-out tag-out tag with
3 you every day?
4 A You mean the--Correct, yeah.
5 Q Any other tools that you--that you--I under--Let me
phrase
6 it this way. I understand that the--the floater, the
7 float, actually brings the--the toolbox for the shift up.
8 Is that right?
9 A Correct.

10 Q Okay. Other than tools that you might get from the
11 toolbox that the float brings up to the production floor,
12 do you yourself have any tools that you keep in your
13 locker or take home that you bring up to the production
14 floor every day?
15 A Yes, I do.
16 Q What are those?
17 A I've got a wrench, alien wrench, and then a screwdriver,
18 and--what's that other--scissors. A pair of scissors.
19 Q And where do you keep those?
20 A In my locker.
21 Q You keep your lock-out tag-out in your locker as well?
22 A Correct.
23 Q Is there anything else you keep in your locker?
24 A My boots. And my--my clothes that we usually wear, I
25 don't bring it home, like my vest. Usually I have a,
[Page 10]
1 yeah, the layered clothes.
2 Q Okay. So you actually wear a vest underneath your white
3 coat for warmth.
4 A Yeah.
5 Q Right?
6 A Mmm. Yeah.
7 Q Okay.
8 A Usually (Indiscernible) of them there.
9 Q And I take it you keep your hard hat and your safety
10 glasses in there too?
11 A That's correct.
12 Q Okay. How do you get to work in the morning, Mr.
13 Florendo?
14 A Second shift. I'm second shift.
15 Q How do you get to work in the afternoon?
16 A I drive my car.
17 Q Okay. You--you drive your car and park it out back at
18 Barber Foods?
19 A That's correct.
20 Q Okay. And what entrance do you usually use to come

into
21 the plant?
22 A My usual is the (Indiscernible) entrance on the other
23 side, usually the other side, there.
24 Q Okay, wait a second. Do--there's--there's two
entrances-
25 A Um-hmm.
[Page 11]
1 Q --out back, right?
2 A Um-hmm.
3 Q One by the cafeteria and--and one that's over by the
4 spiral II staircase?
5 A No, you're talking about the entrance of the car. How--
6 Q Oh.
7 A --(Indiscernible) get into the car, yeah.
8 Q Once--once you bring your car in and park and you're--
9 A Um-hmm.
10 Q --about ready to enter into the plant, is--is there an
11 entrance you usually go in?
12 A The back one, the one by the cafeteria.
13 Q Okay. And then can you tell me--I'll--I'll go back and
14 get specifically what you do at each step, but can you
15 just briefly run through for me what you generally do?
16 Well before I even do that, what time does your--as a set-
17 up operator on the second shift, what time is it your
18 understanding that you're expected to actually be up there
19 and--and punched in, ready to work?
20 A Must be 3:25.
21 Q About 3:25?
22 A Um-hmm.
23 Q What time do you usually arrive at work?
24 A Around 2:50.
25 Q Around two fifty or fifteen?
[Page 13]
1 are in the same general area?
2 A Pretty much, yeah.
3 Q Okay. Now when you do that, is there--at the time that

you arrive on the second shift, is there usually a line that you have to wait in order to get your actual white coat and your glove liners? I'll--I'll go on after this, but right now I'm just talking about when you walk through the door, maybe drop off your lunch and then go to the coat rack and get your white coat and then the glove liners out of the bin, is there usually a line there that you have to wait at?
A Usually there's a line.
Q And how--can you tell me--do you have any sense of--of what the normal amount of people there is usually standing in that line?
A Well it's kind of like if you get your coat, sometimes there's no line, people are mobbing to the front of the coat, you know, getting their own size.
Q It's sort of--there's no real line, it's just there's a lot of-
A Mobbing.
Q --people there.
A Mobbing.
Q Okay. How long, from the time that you actually walk through the door and actually--after you've dropped off [Page 14]
your lunch and head to the coat rack, by the time you're there at the coat rack, how long does it take you to sort of make your way up and--and actually get your coat and your glove liners and head for the cage? Do you have any sense of that? I mean how--how long that actually takes you on a normal, typical day?
A You mean from the time--minutes or some time frame like that, because I--I couldn't really count them.
Q Yeah. Well what I--what I was getting at, let's--let's put aside the time you've gone to the cafeteria, you've

11 already done that, dropped off your lunch. Now I take it
12 you have to come out, go down a hallway,--
13 A Um-hmm.
14 Q --and then there's the coat racks and the--and the bin
15 with the--with the glove liners, right?
16 A (Nods head affirmatively.)
17 Q From the time you actually get down the hallway to where
18 they are, do you--can you tell me your best estimate of
19 how much time, on a typical day, it would take you to
20 actually grab your coat and your glove liners from that?
21 A I think around--probably like ten minutes, something like
22 that. What it is, the coat is not arranged, they're just
23 put tight together, so you have to, once you get there in
24 the front, kind of like find your own size because all-
25 all (Indiscernible) one. The coat rack is only this long.
[Page 15]
1 Size 48, 52, 56 are all in one hangers.
2 Q Okay. And after you--after that time that you've spent
3 getting your--your white coat and--and your glove liners,
4 do you next go to the cage?
5 A That's correct.
6 Q Okay. Now how far--I mean it's not very far from--from
7 where those things are to the cage, is it?
8 A It's like a corner.
9 Q Just--just around the corner--
10 A Um-hmm.
11 Q --and there's the cage, right?
12 A That's right.
13 Q Okay. Now is there--on a--on a normal typical day that
14 you go to work, is there a line waiting at the--at the
15 cage? This is after you've already picked up your--
16 A Um-hmm.
17 Q --your white coat and your glove liners now, when you go
18 to the cage is there usually a line at the cage?

19 A Yeah, sometimes, because the temporary, when they comes
20 in.
21 Q Because? I'm sorry.
22 A The temporary, temps.
23 Q The temps that come in.
24 A Yeah, Mmm. So there's a line.
25 Q Okay. Is there--is--are there--is there some times when
[Page 16]
1 there's no line, where once you've actually got your coat
2 and your glove liners you can just walk right up to the
3 cage and, Hey, I'm here, give me my hairnet, earplugs?
4 A Sometimes, yeah.
5 Q Okay. Is there a--what would you say is most often, that
6 there is a line or that there isn't a line?
7 A If there's a line probably about five minutes, and if
8 there's no line, if the people there is paying attention,
9 sometimes there are a lot of people inside the cage
10 talking, you have to wait there in the front.
11 Q But I take it--I want to make sure I get correctly what
12 you've told me, is--is that--I take it your estimate is
13 that--that generally the wait is around five minutes--
14 A Correct.
15 Q --to--to--you know, from the time you've actually already
16 got your coat and--
17 A Um-hmm.
18 Q --your glove liners now, it's about five minutes until you
19 can get all of your stuff out of the cage?
20 A Correct.
21 Q Where do you go then?
22 A My locker.
23 Q And what do you do at your locker?
24 A Put on the coat, put--everything, get my tools and
25 everything.
[Page 17]

1 Q Okay. You--
2 A Put my shoes on.
3 Q Okay. Once you--once you get to the locker you put
4 everything on, both the stuff that's in the--the stuff
5 that's in the locker and the stuff that you've already--
6 A Correct.
7 Q --the white coat and liner, and everything you've
grabbed
8 from the cage?
9 A Correct.
10 Q How long does that take you? Not--not walking to the
11 locker. Let's just say once you actually get to the
12 locker,--
13 A Um-hmm.
14 Q --so now you're ready to put everything on, how long
do
15 you think it actually takes you to put everything on?
16 A That's--that's from the--from the cage, now, you said,
to
17 the locker?
18 Q Well actually that's a good point. How long do you
think
19 it takes you to walk from the cage to the locker?
20 A About three minutes.
21 Q Why is that? I mean do you have any-
22 A Yeah, you cannot-
23 Q Just because of the distance or because of-
24 A Yeah, distance.
25 Q --the number of people that are in the hallway?
[Page 18]
1 A Because of the people that comes out, in, and like that,
2 on the middle of the hallway.
3 Q Okay. So let's--if it takes on average about three
4 minutes to--You've finally got your stuff from the cage,
5 it takes you about three minutes to actually take
6 everything and get to your locker, right?
7 A I couldn't--would you do that one again?

8 Q Yeah. We went--we went to the point where you picked up
9 your white coat and liners and you said, I think--and once
10 again, I don't want to put words in your mouth so just
11 make sure, if--if I'm incorrect or anything, just let me
12 know that you disagree, okay? I think you told me that
13 you--probably the average, normal on a typical day, was
14 about ten minutes to be able to get your white coat and
15 liner--and glove liners. Right? If I'm wrong, please
16 tell me.
17 A I thought only the coat first, isn't it, and then the--the
18 glove liners.
19 Q Which are in the same place, right beside the coat-
20 A The-
21 Q --rack, right?
22 A Yeah.
23 Q Yeah. And so the--the--to get your coat and your white
24 glove liners, I thought you told me you took an average of
25 about ten minutes. Is that right? From the time you come
[Page 21]
1 A Just the--just the white gloves.
2 Q Just the white--
3 A White--okay. Yeah.
4 Q Okay? What I'm trying to find out is from the time you
5 walk through the door at Barber Foods initially, you know,
6 the--the initial entrance by--
7 A Um-hmm.
8 Q --the cafeteria, until you actually are able to grab a
9 white coat off the rack and a pair of white gloves, how
10 long normally does that take you, to that point?
11 A Did I--ten minutes?
12 Q Okay.
13 A Yeah. Yeah. Okay.
14 Q Yeah. And then from that point you go to the cage,
which
15 is just around the next corner, to get your hairnet and
16 rubber gloves and earplugs. Right?

17 A Correct.
18 Q Okay. Is that--are those the three items that you get out
19 of the cage? At that point?
20 A That's correct, yeah.
21 Q Okay. And how long--how much additional time does it
22 generally take you to go from the coat rack, having
23 already got your white coat, to get those items from the
24 cage?
25 A Did I say five minutes?
[Page 22]
1 Q Yeah.
2 A iv minutes. Yeah.
3 Q Okay. Now, I think you then told me that from--having
4 gotten those items from the cage to actually walk to your
5 locker takes around three minutes. Right?
6 A Correct.
7 Q Okay. So now you're at your locker. You've got every-
8 thing that you brought from the cage or--
9 A Um-hmm.
10 Q --from the coat rack, and you've also got your stuff in
11 your locker. How long does it take you to put all that on
12 before you start walking upstairs? Let's leave out the
13 walking upstairs. Let's--How long does it take you to put
14 that stuff on?
15 A Probably about ten minutes.
16 Q What takes the longest?
17 A Because--
18 Q No, I--what takes--
19 A Oh.
20 Q I didn't ask you what-
21 A Oh.
22 Q --took so long.
23 A All right.
24 Q Well why don't you ask me that? What took so long?
25 A I misunderstood-
[Page 23]
1 Q See?

2 A --the question.
3 Q You made me think of a question. Yeah. What--why does it
4 take you so long?
5 A What is the question now?
6 Q You said--you said you thought it takes you about ten
7 minutes to actually put the stuff on.
8 A Correct.
9 Q I guess my question is why does it take you ten minutes to
10 put--put that stuff on?
11 A Why--yeah, why too long? To take that--
12 Q Yeah, why does it take ten minutes?
13 A Because the locker--number one is when you open the
14 combination lock, sometimes you can easily open it right
15 away, sometimes you can't open it, you have to repeat it,
16 turning and turning, you cannot open it.
17 Q So some of that is, with a typical combination lock,--
18 A Lockers, yeah, Mmm.
19 Q --(Indiscernible) open the darn thing.
20 A That's right, yeah. And then-
21 Q Okay.
22 A --you put your--once you open it, put your shoes on, put
23 everything, the hard hat, back belt, the next--the vest
24 and the white coat, and get the tools and everything.
25 Q Well what do you--what do you do with the tools?
[Page 25]
1 Q Which stairs do you take?
2 A The back--the one that goes toward St. John.
3 Q Okay. The--you take the stairs after the--not the stairs
4 down--that are closest to the stage, but the ones after
5 the long hallway.
6 A That's correct.
7 Q Okay. And when you go upstairs, what clock--what time
8 clock do you usually punch in on, or is there any--Can you
9 punch in on any of 'em or is there one that you always--or
10 almost always punch in on?

11 A You have to punch into the pack-out 1 clock.
12 Q Okay.
13 A Wherever you (Indiscernible)-
14 Q Okay, you work at pack-out 1,--
15 A Um-hmm.
16 Q --so you punch in on the pack-out 1 clock.
17 A That's correct.
18 Q Right?
19 A Um-hmm.
20 Q How long, can you estimate for me, it takes you to walk
21 from your locker to the pack-out 1 time clock?
22 A Three minutes.
23 Q And when you're--when you first come through the door,
24 when you're--when you get to the top of the stairs and
25 open the door to actually enter the production floor, I
[Page 26]
1 take it at that point you--you have to have your coat and
2 your hair nut--hairnet and your earplugs on. Right?
3 A Correct.
4 Q You don't have to have your gloves on at that point if you
5 don't want to, right?
6 A That's correct.
7 Q Okay. Do you usually have 'em on or do you usually wait
8 until after you get inside?
9 A Usually (Indiscernible) first, and then just go in and sit
10 down, put in my pocket.
11 Q Tell me how--so--I'm not--I'm not sure I understood
12 exactly what you mean. When you leave your locker to go
13 walk upstairs and then you open the door to enter the
14 production floor, I--I know you have your coat and your
15 hairnet and your earplugs on. Right?
16 A Um-hmm.
17 Q Because those are required. Right?
18 A Correct.

19 Q Do you usually have your gloves on at that point?
20 A Required by the--the quality control to put it on, and
21 kind of like sanitize it.
22 Q Okay. So-
23 A (Indiscernible) on.
24 Q So when you open the door, do you then--and go in, do you
25 then put your gloves on and dip them into that dipping
[Page 31]
1 covers off and throw them away at that point before they
2 actually punch out too, right?
3 A Correct.
4 Q Okay. But the only thing--the only thing you ever throw
5 away up there is--is the rubber gloves, right?
6 A Correct.
7 Q And after you punch out and head down those stairs, when
8 do you take the rest of your stuff off?
9 A Usually downstairs, when you (Indiscernible) by the locker
10 door, actually there's a garbage by the door but sometimes
11 full already and everything's a mess, so just put them
12 downstairs.
13 Q Okay. Depend upon how many people have already gotten
14 out, the first garbage bag--garbage bins may be full, and
15 more than full, actually overflowing. Right?
16 A Correct.
17 Q In fact by the time you get there, isn't it--isn't it
18 often the case that the first ones are overflowing and
19 there's just--there's--there's plastic gloves--or rubber
20 gloves and hairnets and beardnets and--and stuff like
21 that, often times, overflowing onto the floor, all over
22 those trash bins, right?
23 A Correct.
24 Q Now when do those bins start? I mean there--there's

none
25 on the actual stairway itself, right? I mean--you
[Page 34]
1 saying plastic -- rubber gloves,--
2 A Um-hmm.
3 Q --the blue ones, I take it you often times take at least
4 those off before you actually swipe out.
5 A Correct.
6 Q Okay. And then after you leave the--the--the one thing
7 you've got left to throw away is your hairnet.
8 A Correct.
9 Q Do you usually--and--and do you usually throw that
away in
10 one of the trash bins in the hallway on the way to the
11 locker?
12 A Yeah. Usually downstairs.
13 Q Okay. So by then--so by then you've already taken
your--
14 your hat off, then.
15 A Correct.
16 Q So I--so I take it you must, usually anyway, as you're
17 walking down the stairway or the hallway, you've already
18 taken your hat off and taken your hairnet off. Right?
19 A Correct.
20 Q And as soon as you get the first bin you see that you
21 don't think it's going to fall on the floor, you toss it
22 in it.
23 A Correct.
24 Q Okay. And then do you go to the laundry--the stuff that
25 you have to--to put in the laundry bins is your white coat
[Page 38]
1 Q Okay. You could walk all the way down there, still have
2 your white gloves on, still have your coat on, with all
3 five buttons buttoned, wait until you get right in front
4 of the laundry bin and then peel off your gloves, unbutton
5 your coat, take it off and throw it on the laundry bin.
6 That's one way you could do it. Right?

7 A Um-hmm. That's right.
8 Q Okay. Another way you could do it is as you're walking
9 down the stairs and down the hallway, as--since it takes a
10 few minutes to get there, you know, you can on--while
11 you're on the way you're pulling your gloves off,
12 unbuttoning your coat and--and hauling it off, so by the
13 time you actually get to the laundry bin they're already
14 off, both of 'em, and then you just toss 'em in.
15 A I usually--
16 Q Can you tell me which of those is closer to what you do
or
17 if it's somewhere in between?
18 A Okay. I usually take off my coat right in front of bin,
19 because you cannot do it walking at the same time. You
20 might hit somebody, you know, because it's-
21 Q Yeah.
22 A You open your arms, you-
23 Q Okay.
24 A --might hit somebody in the face when you're walking
25 downstairs-
[Page 39]
1 Q Okay. And how--
2 --indiscernible) yourself.
3 Q Okay. And how about the cotton liners? The white
gloves.
4 A That's already off. But the--the coat, I usually remove
5 it right in front of the--
6 Q Okay.
7 A --the part-
Q Okay, so--so the gloves, you're usually peeling them off
9 while you're walking.
10 A Correct, yeah.
11 Q And then you just hold them, and then when you get in
12 front of the cart you take your--
13 A Coat.
14 Q You take your coat off. How long do you think it takes
15 you to take your coat off? To take your coat off and--and

16 throw it in the laundry bin.
17 A Just to take the--take the coat off? Or--
18 Q Well--
19 A I've got to-
20 Q Yeah. Let's--let's-
21 A The-
22 Q --say just take your coat off first.
23 A Um-hmm.
24 Q I mean how long does it literally take, in your best
25 estimate, to unbutton your--your five buttons and take
[Page 40]
1 your coat off?
2 A Probably one minute.
3 Q And how long does it do--how long does it take you to
4 actually, not including the walk down, but if you have to
5 stand in line or if there's a big crowd around the laundry
6 bin, to actually, once you get it off, to actually be able
7 to get to a position where you can throw it in the laundry
8 bin?
9 A About three minutes.
10 Q And why is that?
11 A Still more people are still around in front of 'em. You
12 can't just throw it because somebody's gonna get mad at
13 you, and (Indiscernible) office, you're in trouble.
14 Q Okay. Now at the locker, how long--how long do you--
how
15 long does it get [sic] you to get from the laundry bin--
16 well you go from there to the cage, right?
17 A Yeah. Correct.
18 Q Okay. And from the time you leave the laundry bin till
19 you go to the cage, drop that stuff off, and then back up
20 to your locker, how long do you think it takes you there?
21 A That's going back to-
22 Q You go to the cage and drop it off. Right?
23 A Yeah.
24 Q But that--that you just drop it off and say, like, either
25 Helen or Sharon, "Here's my stuff." Right?

[Page 41]
A No, sometimes you have to wait for them there, to return to cage, because usually they take your name, what kind of materials that you usually check it out, and they have to cross it out before you--to return it.
Q Yeah. But isn't it--isn't the usual situation there, though, that--that when you come with the cage--with your materials--Do you ever go in the back door of the cage or do you always drop it off at the window?
A At the window.
Q Okay. And isn't it the usual that you just go up and--and you've got the numbers or your metal--metal detector stick and you just drop it off and, you know, they know who you are anyway, both of 'em, right?
A If they were there.
Q If they were there.
A Yes.
Q Are there occasions when neither of them are there?
A Sometimes they're not there.
Q Okay. How often does that occur?
A Let's see. I think one--like three times, three times in one week. Sometimes they are outside.
Q Outside where?
A See there's a back door.
Q Yeah.
A Get out there, probably smoking, then come back.
[Page 42]
Q You--if there's somebody there, if either Sharon or Helen are there or both of them are there, it doesn't take very long to drop off your stuff at the cage, does it? At the end of your shift?
A What I usually do is make sure that they cross it off my--the numbers that I borrowed.

7 Q You usually make sure--you usually wait to make sure they
8 cross it off. Right?
9 A Correct. Yeah.
10 Q Why do you do that?
11 A Sometimes I would return one numbers and then they try to
12 find--try to find me to find the--to get the numbers and
13 said I forget to return it. Here it is.
14 Q That's happened to you before?
15 A Yeah. So I make sure I wait before I leave.
16 Q Okay. Can you give me some sense of what the usual time
17 is it takes you to actually drop your stuff off at the
18 cage at the end of the day?
19 A You mean if there's somebody there.
20 Q I'm sorry?
21 A Repeat the question again.
22 Q Yeah. Can you give me some sense of the--of the time, if
23 there's a usual time, that it takes you to actually drop
24 your stuff off at the cage at the end of the shift?
25 A If there's somebody there, take about a minute.
[Page 43]
1 Okay.
2 If there's nobody there, I have to wait for like four or
3 five minutes.
4 Q If there's nobody there.
5 A Nobody there, yeah.
6 Q And then you go to your locker.
7 A Correct.
8 Q Okay. How long does it take you to walk to your locker?
9 A From the cage, is it?
10 Q Yeah.
11 A I'd say that's three minutes.
12 Q And once you get to your locker, at that point you've got

13 to put your lock-out tag-out and your tools back in your
14 locker. Right?
15 A Correct.
16 Q You've got to change from your steel-toed boots into
your
17 regular shoes or whatever you wear to work. Right?
18 A Correct.
19 Q And whatever you're wearing for--for warm--for
warmth,
20 you've got to take that and put it in your locker. Right?
21 A Correct.
22 Q And your back belt, bump hat, and safety glasses
you've
23 got to toss in there. Right?
24 A Right. Yeah.
25 Q Okay. How long does it take you to do all that, once
[Page 44]
1 you've got to your locker, to just take that stuff off and
2 get it in and close your locker and you're ready to roll?
3 A I'd say four minutes.
4 Q And then how long does it take you to get from your
locker
5 outside?
6 A Roughly three minutes, I think.
7 Q Now how long approximately, do you think, from the
time
8 you actually, on a normal day, from the time you actually
9 swipe your card to punch out until you walk out the
10 entrance by the cafeteria at the end of the day, how long
11 does it usually take you?
12 A Hmm.
13 Q On a normal day. If there is such a thing as a normal
14 day.
15 A Oh, about seven or eight minutes, I think. You mean by
16 the time I remove everything, you said.
17 Q Yeah. From--from--what I want to know is your best
18 estimate of--of from the time you actually swipe your card

19 on the out clock upstairs,--
20 A Okay.
21 Q --until you've come down, you've--you've dropped your
22 hairnet in the garbage, you've dropped your gloves and
23 coat off at the, you know, at the laundry bin, you've
24 dropped your materials off at the cage, you've gone back
25 to the locker to take your stuff off and put it away and
[Page 48]
1 Q Or Maria Pulsoni.
2 A Um-hmm.
3 Q Okay. Are you aware of any situations since December 1997
4 where any of those individuals, or anybody else, shaved
5 your lunch period so that you didn't--when--Do you know
6 what I mean when I say "shaved"? In other words took time
7 off it, so that you didn't actually get your thirty
8 minutes lunch break?
9 A We just notice about sometimes the break is too short.
10 Thinking--I don't know if they shave or--I don't know
11 what's that thing that, sometimes that break is a little
12 bit too short for thirty minutes.
13 Q Sometimes it feels short?
14 A Yeah. Is like only twenty-seven, sometimes twenty-five,
15 sometimes--
16 Q And how do you know that?
17 A Because sometimes when you look at the clock, sometimes
18 the--the clock are set different, too. (Indiscernible)
19 five minutes fast.
20 Q Okay. Have you--have you kept track of those situations
21 when--when you felt that you weren't getting your full
22 thirty minutes?
23 A (Indiscernible) mean-

24 Q Yeah, like have you ever kept track of it, saying, you
25 know, we didn't--you know--For example, can you tell
me
[Page 54]
1 Q Okay. And then you testified when you have to drop
things
2 off at the cage at the end of the day, how--how often is
3 there nobody at the cage when you go to drop your stuff
4 off, drop the Thiele number and the metal detector stick
5 and--
6 A Usually one--like three days in a week, and sometimes I
7 even bring the thing with me because there's nobody there.
8 Sometimes the people that are supposed to be there left
9 already, so I have to bring it home.
10 Q How often has that happened?
11 A Well, in--one week I think is like twice, twice, 1998,
but
12 this year, you know, it's--there are all somebody there.
13 Q Okay. And then you testified that it takes about three
14 minutes to walk from the cage to your locker at the end of
15 the day. How confident are you about--about that number?
16 A Yeah, about three minutes, yeah. Yeah.
17 Q And you said--you testified that at the locker you have
to
18 change and put away your tools and--and other equipment
19 that you store in your locker. You testified that it
20 takes about four minutes. How confident are you about
21 that?
22 A You mean does it--drop everything already?
23 Q Right, just the--the things that you have to do at your
24 locker.
25 A So I said ten minutes.
[Page 55]
1 Q How long does that, just--just at the locker, take?
2 A To do everything, put it away, everything?
3 Q Yes.
4 A About eight to ten minutes.

5 Q Just at the locker.
6 A That's correct, yeah.
7 (Off-record comments; the deposition continued:)
8 Q And then you said that to walk from the locker to outside
9 takes approximately three minutes.
10 A Correct.
11 Q Is that correct?
12 A Correct.
13 Q Okay. And do you remember approximately when the
cage
14 came into existence?
15 A I'm not really sure of the date, though.
16 Q Do you remember approximately?
17 A I think around ninety--I--I really cannot give you the
18 date there, because when the other cage--because they
19 switch it around. I think Alan Gilman was still there.
20 think 1997, around 1997.
21 Q Okay. And then how many people worked at the cage
when it
22 first opened up?
23 A Only one person.
24 Q So did it take a longer time or a shorter time than it
25 does now to get your equipment from the cage?
[Page 56]
1 A What was that again?
2 back when there was only one person at the cage,--
3 A Um-hmm.
4 Q --compared to now,--
5 A Um-hmm.
6 Q --does it take longer now, shorter now, or the same
amount
7 of time as it did when there was only one person in the
8 cage?
9 A Shorter now.
10 Q It's shorter now?
11 A Yeah. Yeah. Even if there's three people, but
sometimes

12 they are talking and everything, and they (Indiscernible)
13 some of the people in front of them, because usually
14 there's like six or five of them inside the cage. There's
15 supposed to be two people. People are talking. Once you
16 get their attention then you get a swear, they swear at
17 you. Oh yeah.
18 Q So they have a language problem there?
19 A Oh yeah. It was Sharon, how many times.
20 Q Do you know about how much longer it takes to get your
21 equipment in the morning, how--how much more time it took
22 when there was one person than now, to get your equipment
23 in the--at the beginning of the shift?
24 A Before? One person before, is that what you're saying?
25 Q Right. How much longer did it take then than it does now?
[Page 57]
1 A I couldn't give estimate, no. Be a long time.
2 Q It's been a long time
3 A Yeah.
4 Q So you couldn't give a--
5 A No. Couldn't give it.
6 Q Okay. How long does it take you to find parking in the
7 morning?
8 A Second shift. I'm second shift.
9 Q In the afternoon. Fall into that trap too.
10 A Usually it takes longer to find a parking space.
11 Sometimes they're already there in a car instead of--all
12 the same people are going to park, they just, you know,
13 going to fix their hair and they fix their eyes and, "Come
14 on people, are we gonna park? I'm gonna be late." They
15 just ignore you. (Indiscernible) cool.
16 Q So typically how--how long do you think it takes to--to
17 find a spot?
18 A It takes me about fifteen minutes to park.

Q About fifteen minutes? Is that--
A Yeah.
Q --typical?
A That's correct, yeah.
MR. DIXON: That's all I have.
MR. STEVENS: That's all I've got.
(The deposition concluded at 4:07 p.m.)

Exhibit 3

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, et al,	*	
	*	
Plaintiffs,	*	
	*	
v.	*	CIVIL NO. CV-00-371-P-C
	*	
BARBER FOODS,	*	
	*	
Defendant.	*	

DEPOSITION of DEICO MEKONEN, was held at the law offices of Kelly, Remmel & Zimmerman, 53 Exchange Street, Portland, Maine, on October 25, 2001, before Roxanne DiMarco, a Notary Public in and for the State of Maine.

APPEARANCES:

For the Plaintiffs:	Charles Dixon, Esq.
For the Defendant:	Graydon G. Stevens, Esq.
Translator:	Ghezai Menelik

[Page 5]

1 almost all the time that you're on the production floor?
2 Yes.
3 Q Do you usually wear the white glove liners?
4 A Okay. I wear the white and the blue on the top of it.
5 Both of them.
6 Q Do you--do you usually wear an apron over your white coat?
7 A Yes, I do.
8 Q Do you usually wear sleeve covers?
9 A Yes, I do.
10 Q Do you wear earplugs?

11 A Yes, I do.
12 Q Do you wear safety glasses?
13 A Yes, I do.
14 Q Do you wear those all the--do you wear those almost all
15 the time on the production floor?
16 A The safety glasses start on three--three weeks ago, but
17 once I am on the shift, I wear them all the time. Before
18 three weeks, in different areas, they ask you to wear
19 safety glasses and then you was other required, but now
20 it's a must. (Indiscernible) just do it.
21 Q Okay. Do you wear a plastic bump hat normally?
22 THE TRANSLATOR: Bump? What is-
23 MR. STEVENS: It's--it's a hard--you know, like a
24 construction site hard hat,-
25 THE TRANSLATOR: Like a-
[Page 6]
1 MR. STEVENS: --but it's plastic.
2 THE TRANSLATOR: --(Indiscernible)? Something like
3 that? The--the construction workers?
4 MR. DIXON: Yes.
5 MR. STEVENS: Yeah, that type of hat.
6 THE TRANSLATOR: Type of helmet.
7 MR. STEVENS: Yeah. That's what it is, but it's
8 plastic.
9 THE TRANSLATOR: Okay, plastic. Okay.
10 A Okay. It's not always and not in all areas, but there are
11 certain areas where there are certain items may fall,
12 (Indiscernible) on your head, then I have to wear them.
13 And also in certain cold areas I wear the bump hat, and
14 then when I go out I just take them off.
15 Q So am I correct that you--you do not take a bump hat
with
16 you to the production floor every day?
17 A So I--I don't take it to production floor. At all.
18 Q When you need a bump hat, where do you get it?
19 A Either we--they place them on the spot and we pick
them

20 from there or they're--and we just go to whatever those
21 things are and they pick them from there and they come
and
22 they give us.
23 Q Do you wear a back belt?
24 THE TRANSLATOR: Back belt?
25 MR. STEVENS: Back belt.
[Page 7]
1 A Yes.
2 Q Do you wear that every day?
3 A Yes.
4 Q Do you have a locker?
5 A Yes.
6 Q What do you keep in your locker?
7 A Eyeglasses, the safety glasses. The safety glasses? The
8 belt. A coat.
9 Q A what? I'm sorry.
10 A A coat. Coat.
11 Q Oh, a coat.
12 A Yeah, c-o-a-t.
13 Q Yeah.
14 A And shoes. Boots. Are they boot? Okay. Shoes.
15 Q What kind of a coat is that that you keep in your locker?
16 A In a warm place, just for the warm place, they give the
17 long coats. That's what we wear.
18 Q Now what kind of a--do you have to wear steel-toed
boots
19 to work?
20 A No, I wear my own, not the other.
21 Q What time does your shift start in the morning?
22 A 6:25.
23 THE TRANSLATOR: Here I--I try to ascertain, when I'm
24 asking him about the time, because he is speaking
Amharic and
25 in the Amharic language you--well you start the day from
6:00
[Page 11]

1 other one. They're all together.
2 (Deponent and Translator converse.
3 A They are--one is on the left, the other one is the right-
4 hand side, so I just pick one, then I pick the other.
5 (Deponent and Translator converse.)
6 A After I do this, after the liner and the clothes, after I
7 pick up, then I go to the other place to pick the hairnet,
8 the beard cover, the ear cover, plastic glove. Plastic
9 glove.
10 Q Okay. And what is the--Is there usually a line at the
11 window waiting to pick--of people waiting to pick up
12 their--their hairnets and beardnets and--and plastic
13 gloves?
14 A Yes.
15 Q What is the--typically, or normally, how many people
are
16 there in that line when you--when you get there to get
17 your stuff?
18 A Well, the people come from all directions so I--I never
19 counted how many people. There are the people, one
comes
20 from this direction, the other one comes from the other,
21 so I really don't know.
22 Q How long does it normally--Is there normally a line
where
23 you have to wait in order to get your white coat and
24 gloves?
25 A About seven to eight minutes.
[Page 12]
1 Q I'm not asking how long it--what--What I'm asking is is
2 there usually a line, just where you pick up your--your
3 white coat and your gloves, not the window where you pick
4 up everything else, but the white coat and the gloves, is
5 there usually a line that you have to wait in order to
6 pick those up?
7 A What he said is the place is very narrow, so when
everyone

8 picks whatever they pick, they have to wait outside, so
9 you make way for them, but I don't know exactly how
many
10 people line up there to pick their items.
11 Q From the time you get there, which is usually around
6:10,
12 until you pick--until you get your white coat and gloves,
13 how long does it usually take you from the time you
arrive
14 at 6:10 to actually get your white--white coat and gloves?
15 A It's about--it takes me about ten minutes. If I start at
16 6:10, I finish by 6:20, 6:18, around that time.
17 Q Finish what by 6:18?
18 A Going up, going from the start I come there, from the
19 moment I come there, I line up, so I go in, pick things
20 and then come out, (Indiscernible) my time about 6:18.
21 The whole process takes me about eight or ten minutes.
22 Q When you say the whole--After you get your--whatever
you
23 get from the windows, the hairnet and the beardnet, from
24 the window, and the--and the plastic gloves, do you then
25 go to the locker?
[Page 13]
1 A Yes, I do.
2 Q And what--
3 THE TRANSLATOR: May I add something?
4 MR. STEVENS: Yes.
5 THE TRANSLATOR: That I--the one that I said eight to
6 ten minutes' time,--
7 MR. STEVENS: Well--
8 THE TRANSLATOR: --he said at 6:10, that's only to
9 pick the clothes and so on from that--That's what he said.
10 MR. STEVENS: Okay. That's what I was being
11 confused, is--is I was trying to break it down. And so am I
12 correct, and--and you can then say this to me and get me
back
13 with a yes or no,--

14 THE TRANSLATOR: Yeah.
15 MR. STEVENS: --that--that the estimate of eight to
16 ten minutes' time is the time it takes him to get from the--
17 arriving at the plant and walking through that door at about
18 6:10, until he actually is able to pick his white gloves--white
19 gloves and white coat off the rack? That's the eight to ten
20 minutes?
21 THE TRANSLATOR: Yes.
22 (Deponent and Translator converse.)
23 THE TRANSLATOR: Yes.
24 Q And from the time that you then have your white coat and
25 gloves in your hand until you're able to get your hairnet
[Page 14]
1 and beardnet from the person handing it to you out of the
2 window, how long does that usually take you?
3 A Oh. He is saying, From the time I arrive there, 6:10,
4 pick my--the white coat and then the--the gloves there,
5 and then I go to the cage to pick the hairnet and the--
6 Q Beard cover.
7 A --beard--
8 Q Beard cover or beard--
9 A Beard cover, whatever, up to that time it takes me eight
10 to ten minutes. This is the whole process.
11 Q And from the time after that eight to ten minutes -- so
12 you've--you've got your coat and gloves and you've got
13 your hairnet and beardnet -- from the time you've got
14 those to go to your locker and get whatever you get out of
15 your locker, how long does that--and put it on, how long
16 does that take you?
17 A It takes me about seven minutes. That is from the cage
18 until he picks everything from his locker.
19 Q And how long does it usually take you once--to go from
20 your locker up to swiping your card and punching in?
21 A About two minutes.

22 (Deponent and Translator converse.)
23 A Well, normally I go and swipe the card only after I am
24 assigned my job, but before that I don't do it.
25 Q Who assigns you your job?
[Page 17]
1 THE TRANSLATOR: Okay.
2 MR. STEVENS: So that's--I'm using specific terms and
3 that's really all I want him to focus on, is the specific terms
4 that I use.
5 THE TRANSLATOR: Okay.
6 (Deponent and Translator converse.)
7 A Regardless what time I arrive at the plant, if it is
8 earlier than 6:25 I'm not allowed to go upstair to where
9 my job assignment is given to me, so that means I have to
10 wait there up to twenty-five past 6.
11 Q Do you usually--Is it normal that you have to wait
before
12 you can go upstairs to punch in?
13 A What he is saying is, okay, we (Indiscernible) up to
going
14 to the locker,-
15 Q Yes.
16. A --that is from picking the clothes and going to the
cages
17 and to the locker. Now he--he's said he's--I wait at the
18 locker up to 6:25. When it is 6:25, then I go upstair to
19 where my supervisor is, and then we wait for him there.
20 And when he tells us our respective assignments, then we
21 go to the time clock and we pass through the cards.
22 (Deponent and Translator converse.)
23 A We don't go upstair before six--6:25. So once it's 6:25,
24 then we go upstair, we wait for our supervisor, and then
25 when he gives us our (Indiscernible) assignments, then we
[Page 18]
1 go (Indiscernible) the time clock.
2 is there anything that you put on after swiping the time
3 clock?

4 A If I go to the meat department to cut meat, I put gloves.
5 (Deponent and Translator converse.)
6 A Sometimes I put iron (phonetic) glove, or something made
7 of iron glove, so that--to protect our hand from being cut
8 off.
9 (Deponent and Translator converse.)
10 A We also put certain white item, white gloves, other
11 clothes, (Indiscernible) say maybe is white sleeve?
12 Q Yes. I was going to say you put your--you usually put
13 your sleeve--sleeve covers on--
14 A Yes.
15 Q --after you've punched in. Right?
16 A But he's saying he's not assigned to the same place all
17 the time, so one time he puts certain glove, other time he
18 puts another kind of sleeve, what he's saying.
19 Q Mr. Mekonen, if you were to go to the plant and not have
20 to get on any of this stuff, but could just go to the
21 plant and walk up and punch in, how long do you think it
22 would take you, just go--from the time you enter the plant
23 to walk up and punch in, without having to get any of this
24 stuff?
25 A To use his words, Well, I'm just a young fellow, so it
[Page 19]
1 take me about a minute or two. I'm not an old guy, is
2 what he's saying.
3 THE REPORTER: I'm not a what?
4 THE TRANSLATOR: I am not an old person,-
5 THE REPORTER: Oh, okay.
6 THE TRANSLATOR: --so it takes me a minute or two.
7 mean I use his-
8 Q From--at the end of the shift, when it's time to go home,
9 from the time you actually swipe and punch out until you
10 leave the plant door, how long does that take you?
11 A It takes me about seven minutes. That is after doing
12 everything I need to do, it takes me seven minutes.

13 Q Do you take off anything and--before you punch out?
14 A No, I don't take off any. He's not allowed to take off
15 anything.
16 Q You can--it's allowed to take off your apron and throw
it
17 away before you punch out, isn't it?
18 A No, I don't.
19 (Deponent and Translator converse.)
20 A The time clock is at the door, therefore I don't take off
21 anything before I swipe my--my--the card, and then only
22 after I pass that and I--I start dropping off things.
23 Q Do you start taking off things while you're walking
down
24 the--After you swipe the card, do you start taking off
25 things while you're walking down the stairs and down the
[Page 20]
1 hail?
2 A After I go past the swipe, I just start taking off things
3 from my hand, but I just carry them myself, I don't just
4 drop them.
5 Q Before you--while you're walking, after the swipe and
6 while you're walking down the stairs and the hail, before
7 you get to the laundry bin and the trash bin where you
8 throw the coats and what--and the stuff that you're going
9 to throw away, do you usually already have it all off? So
10 you just have to throw it in the bins?
11 A Well I just--as I go on I just take off my clothes and
12 then I just put them there, where everyone puts his--his--
13 Q That is exactly what my question is, is do you--do you
14 usually have your stuff off by the time you get to the
15 bins where you're going to put it?
16 THE TRANSLATOR: And have everything on his hands.
17 MR. STEVENS: Yes.
18 A So as I go past the--the swipe, the time--the time clock,
19 and I start taking off items like the hairnet and so on,
20 and as I go past our, I think, locations where I--I drop
21 them in the basket, not--not just anywhere but just

22 containers (Indiscernible) but there I--I leave them. But
23 at the end I have my clothes where I have to put it in a
24 certain place to be sent to--for laundry, it seems to me,
25 that's all (Indiscernible)
[Page 21]
1 Q The two things that have to go in the laundry are your
2 white coat and your white gloves, right?
3 A Yes. Those two items go to laundry, but the other things
4 that protect me from--
5 Q I understand. All I'm asking is the only thing--the
6 things that go in the laundry are the white gloves and the
7 gloves--and the white gloves, right?
8 A Yes.
9 Q Okay. And by the time you've got to there, you've
already
10 thrown away your other stuff, right?
11 A Yes, I drop them.
12 Q And by the time you get to wherever you deposit the
13 laundry, the white coat and the gloves, you've already
14 taken them off while you're walking, right?
15 THE TRANSLATOR: That is the--the coat and the glove,
16 huh?
17 MR. STEVENS: Yes.
18 A No, I just take them off, the white coat and the white
19 glove, right at the place where I give for laundry.
20 Q How long does it take you just to take off the white
21 gloves and the white coat?
22 A It is just not--I--I don't time myself, but it doesn't
23 take me--doesn't take time, is what he's saying.
24 Q How long does it take to take off your hairnet, beardnet
25 and earplugs and stuff that you throw away every day?
[Page 22]
1 A Because I just throw these things on the way as I go on, I
2 never bothered to--to keep time.
3 Q Can you give me any estimate at all of how long that
4 takes, just to throw the stuff away?
5 A It's very difficult for me to say anything, but what--what

6 it would just take me maybe a minute or two or three, and
7 that's--that's as I walk on. I don't--I don't time
8 myself, in other words, he's saying.
9 Q Is--is most of the time, from swiping your card until you
10 leave the outside door of the plant, is most of that--most
11 of the time that it takes you on a normal day spent
12 walking?
13 THE TRANSLATOR: Just walking or just as he--his
14 normal--normal process?
15 MR. STEVENS: Yeah. Well what I'm--what I'm trying
16 to get at, if it--
17 THE TRANSLATOR: Yeah.
18 MR. STEVENS: --if it only--if it takes hardly any
19 time to take your white coat and gloves off,-
20 THE TRANSLATOR: Yeah.
21 MR. STEVENS: --if it takes hardly any time to throw
22 something away,-
23 THE TRANSLATOR: Yeah.
24 MR. STEVENS: --and if you're doing that while you're
25 walking, I--I think Mr. Mekonen said that it normally
takes him
[Page 24]
1 (Deponent and Translator converse.)
2 A Well there's a place where people take normal--normally
to
3 go out, but I often go through the shortcut, so--because
4 from the upper place where I go to time clock, so I take
5 the shortcut and I go out. Because the reason I'm saying
6 this is because I don't want them to think that I am
7 telling a lie.
8 Q How long do you get for a lunch break?
9 A About thirty minutes.
10 Q Are you aware of any situations in which you have not
been
11 given your thirty minutes for lunch break?
12 A This is a good question, he says. (Indiscernible.)
13 Q Glad I finally asked a good question.

14 A I think they work in a--in a line, so first the first one
15 goes to, I think, to have lunch, and then the--the one who
16 is last has to wait until the production stops, so he
17 cannot go, it seems to me, unless they come, so substitute
18 to replace him. Okay?
19 (Deponent and Translator converse.)
20 A Okay. What he said is, We just do these things turn by
21 turn, we don't know who goes first or who goes last,
today
22 may be the first, another time may be the last one, so we
23 do it turn by turn, and unless one comes you cannot leave
24 the production and go away, and normally I go with the
25 first batch, but then I may have, perhaps, have to wait
[Page 25]
1 for others to come too, depends, so I never ideally took
2 time and I--I don't really know how long it takes me, so I
3 don't know, maybe I was taking thirty minutes or less than
4 thirty minutes. (Indiscernible) what he's saying.
5 Q Am I correct that you don't--Have you ever kept track of
6 the time that you get for a lunch break? Actually kept
7 track of the time?
8 A When they call me to work, I go to work. When they tell
9 me to rest, I rest. So I never kept track of it.
10 (Deponent and Translator converse.)
11 A I think they are in a line and they go to--for lunch,
12 lunch break, turn by turn, it seems to me, but it seems to
13 me what he's saying is whoever is at the end of the line
14 has to come up to the place together with those who left
15 first, who left earlier, so (Indiscernible) it's logical
16 that the one who left last takes lesser time than the
17 rest, although this assignment is not given only to him
18 but they do it turn by turn, so it means one time, a
19 certain time, you have a full time, then another time you
20 have less time. That's what he's trying to say.
21 Q Have you ever been required to go visit the nurse
during
22 your lunch break?

23 THE TRANSLATOR: Nurse--what did you call, nurse
24 what?
25 MR. STEVENS: During your lunch break
[Page 26]
1 THE TRANSLATOR: Nurse what?
2 MR. STEVENS: Have you ever been required to go visit
3 the nurse during your lunch break?
4 A No, I don't remember that.
5 MR. STEVENS: No more questions.
6 THE TRANSLATOR: Okay.
7 MR. DIXON: I. have a--I have a couple questions.
8 THE TRANSLATOR: Yes, sir.
9 EXAMINATION BY MR. DIXON:
10 Q You said earlier that you go up to the time clock at
6:25.
11 A Yes.
12 Q And that you sometimes have to wait for your
supervisor to
13 tell you what job you have.
14 A No, but that's always. It's not only sometimes, but
15 always--
16 Q Okay.
17 A --we have to wait for the supervisor.
18 Q So how long typically do you have to wait for your
19 supervisor to give you your work assignment for the day?
20 A About six to seven minutes.
21 Q And when you're at the--at the--during lunchtime, when
the
22 announcement that lunch is starting is made and you're at
23 the end of the line, how long do you have to wait before
24 you get to leave the production room?
25 (Deponent and Translator converse.)
[Page 27]
1 MR. STEVENS: Can I stop you for a second please?
2 THE TRANSLATOR: Okay.
3 MR. STEVENS: Whatever answer he gives now, I'm--I
4 have absolutely no clue as to what question he's--

5 THE TRANSLATOR: The question is this.
6 MR. STEVENS: Yeah.
7 THE TRANSLATOR: I think, if I have understood it
8 correctly, his question is this. Well they have lunchtime, say
9 thirty minutes lunchtime,--
10 MR. STEVENS: Yes.
11 THE TRANSLATOR: --so now they announce lunchtime.
12 When they announce lunchtime, well in principle people should
13 start leaving for--for lunch. So because they work in line,
14 now the first one goes out, but one who is last has to wait
15 until what has--
16 MR. STEVENS: Absolutely but--
17 THE TRANSLATOR: So his question was how long does it
18 take if you--if you leave and from the time they announce until
19 the time you leave, if you are the last one? That is the
20 question, yeah?
21 MR. DIXON: Well let me rephrase the question.
22 THE TRANSLATOR: And that's what I am saying, how
23 long-
24 MR. DIXON: Let me rephrase the question.
25 Q How much longer does it take for the last person to get
[Page 28]
1 out the door of' the production room for lunch than it
2 takes for the first person o ye out the door of the
3 production room for lunch?
4 THE TRANSLATOR: So more or less, after the first one
5 left, how long does it take you for you to leave if you are the
6 last one?
7 MR. DIXON: Correct.
8 MR. STEVENS: Yes.
9 THE TRANSLATOR: That's what you're saying.
10 MR. DIXON: Yeah.

MR. STEVENS: Correct.
THE TRANSLATOR: Okay.
(Deponent-and Translator converse.)
A Four minutes.
MR. STEVENS: There. Thank you. Okay.
(Deponent and Translator converse.)
A Four minutes.
MR. DIXON: Okay. That's all I have.
MR. STEVENS: That's all I have, too.
THE TRANSLATOR: Okay.
(The deposition concluded at 12:30 p.m.)

Exhibit 4

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, et al,	*
	*
Plaintiffs,	*
	*
V.	*
	*
BARBER FOODS,	*
	*
Defendant.	*

DEPOSITION of ERNEST LEVESQUE, was held at the law offices of Kelly, Remmel & Zimmerman, 53 Exchange Street, Portland, Maine, on October 26, 2001, before Carla Culver, a Notary Public in and for the State of Maine.

APPEARANCES:

For the Plaintiffs:	Charles Dixon, Esq.
For the Defendant:	Graydon G. Stevens, Esq.

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EXAMINATION	PAGE
BY MR. STEVENS	3

EXHIBITS

No Exhibits were marked.

[page 8]
1 Q Almost like galoshes type of things you just slip on?
2 A Yeah, they're a boot with an insole inside.
3 Q And what did you wear under them for footwear?
4 A Nothing, just socks, it had its own insole, was like a
5 wear boot (phonetic).
6 Q You'd come to work with whatever you wore --
7 A Oh, sneakers, and you'd have to take them off, put them
in
8 the locker, put those boots on.
9 Q One more rule in addition to saying yes or no instead of
10 uh-huh is that I'll do my absolute best not to interrupt
11 you when you're giving an answer.
12 A Oh, okay.
13 Q And sometimes you know -- you know, it's very easy,
you
14 know the topic that we're talking about so you can
15 anticipate where I'm going with my question, and the
16 natural human reaction is to just jump in and start
17 answering. But please try to wait because it really makes
18 for a messy transcript if we don't. Okay?
19 A Okay.
20 Did you have to wear earplugs in the meat room?
21 A Yes.
22 Safety glasses?
23 A Yes.
24 A bump hat?
25 A Yes.
[page 11]
1 their jobs and making it so the work environment gets
hostile on a basis [sic]. If the production level is not
3 up to what they consider the goal for the day, they push
4 the workers harder. You know, they make for a real
5 hostile work environment.
6 Q What else do you keep in your locker besides a little box
7 with extra gloves and extra aprons?
8 A I walked in with my coat from like if it was winter, to

9 put my coat -- my shoes I had to take off cause I wasn't
10 about to ruin them on that floor.
11 Q I'm not talking about the stuff that you would leave in
12 the locker.
13 A Okay, but --
14 Q Please try to remember not to talk over me, okay?
15 A Okay.
16 Q And I'm not talking about the stuff that you when you
come
17 in off the street would leave there. I'm talking about
18 the Barber Foods issued equipment or clothing that you
19 would leave in your locker all the time, okay. Let me run
20 down through, maybe that would be the better way to do
it.
21 Where did you get the white coat at the beginning of the
22 day?
23 A From the clothes rack.
24 Where did you get your hairnet?
25 A Same place. See, they had this little room where you
have
[page 12]
1 to get the stuff from.
2 Q Let me ask you, was there a cage?
3 A They were building it at the time.
4 Q At the time you left they were building the cage?
5 A They were building this cage for dispensing the stuff.
6 Q At any point while you -- by the time you left or at any
7 point when you were employed at Barber Foods did you
have
8 to get any materials out of the cage?
9 A Oh yeah, near the end cause they just got the cage built.
10 They did put it on line about the -- August.
11 Q And you think it was put on line approximately August
'99,
12 about the last month that you were employed there?
13 A Yeah.
14 And then at that point I take it you'd have to get your

15 hairnet, and earplugs, and --
16 A Um-hmm, from that supply cage, yes.
17 And before then you would still get your coat from the
18 rack, right?
19 A Yup.
20 And where was the rack usually located?
21 A The rack -- all that stuff was locked up in the dry goods
22 area and you had to get a key because at the time I showed
23 up no one was there.
24 And where did you get the hairnet?
25 A From -- there's the rack and then there's the -- all that
[page 13]
1 stuff was put on a doily, the hairnet, the beard nets, the
2 gloves, the liners, the aprons, --
3 Q Earplugs.
4 A -- and earplugs. They're all on this dolly right next to
5 the coats. And when the normal shift came in they wheeled
6 'em out, okay, and the people would stand in line,
7 sometimes excessively long, to wait in line just in order
8 to get their stuff. I was punching in at 5:30 in the
9 morning and I was able to get in there, you know, but I
10 still had to chase down the key because it was locked up.
11 Q Okay, let's -- let me start here first. What time were
12 you expected -- what was the expectation that you would
be
13 punched in so your shift would start, what time?
14 A Let's see, the punch in time was 5:30, but I was
expected
15 to be there at 5 to make sure my gear was on.
16 Q You were expected to actually be where at 5:30?
17 A At the plant. You know, at one time they had it in the
18 manual, and I went and I looked, they changed the
manual,
19 but the first manual, I owned it, had it clear in black
20 and white print, You are expected to show up half-an-hour
21 before your shift to have all your gear on.
22 You actually saw that in a manual somewhere?

23 A Yeah, but that manual I don't have a copy of anymore.
24 They went and redid the manual and the new manual
didn't
25 have it, have that statement in there.
[page 14]
1 Q But what I'm wondering is, you worked in the meat
room,
2 where did you punch your clock?
3 A Upstairs on the production floor.
4 Q Which clock did you use?
5 A The meat room clock was inside the meat room
department.
6 Q So is that -- when you say 5:30, is that where you were
7 expected to be to punch in at 5:30?
8 A Um—hmm.
9 Q What time -- did you drive your own car to work?
10 A Yes.
11 Q What time did you usually arrive at work?
12 A Five o-clock.
13 Q And after you got to work, what would you do, just
typical
14 of what you would do?
15 A Well I'd have to go get the gear, and that would take
16 fifteen to twenty minutes, depending on how many people
I
17 had to chase down in order to unlock the closet to begin
18 with. And then the procedure, you have to get all the
19 gear on cause you cannot walk on the production floor in
20 street clothes, period. You have to have the coat, the
21 hairnets, and in my case I made sure the boots because
you
22 go up there, they have that soap that they were cleaning
23 the equipment with all over the floor in puddles because
24 the cleaning crew hadn't done their final squeeging of the
25 floor. That soap was rather caustic to shoe glue, and if
[page 16]
1 A Yeah.

2 Q How about your earplugs?
3 A That was from the dry goods as well.
4 Q Safety glasses?
5 A That one was issued.
6 Q And did you take those home at night or did you keep
7 them --
8 A I left those in the locker right next to the boots.
9 Q And your bump hat?
10 A Same thing, issued, kept that in the locker.
11 Q And your back belt?
12 A That was issued and I kept that with the locker.
13 Now how many people -- you usually got there to work at
5
14 o'clock and you'd have to find a key to get into dry goods
15 to get your stuff, right?
16 A Right.
17 And how many other people would work in the meat
room with
18 you?
19 A Eight.
20 And so I take it once you found the key and got in there,
21 you didn't really have to stand in line to get your stuff,
22 right?
23 A No, there was no real line standing.
24 So the only delay in actually getting to where you had to
25 get your stuff was to find somebody to give you a key?
[page 17]
1 A Um-hmm.
2 Q Who did you have to find to get a key?
3 A Well if they had punched in on time and wasn't late,
4 usually the dry goods operator.
5 Q What do you mean if you had punched in on time and
wasn't
6 late?
7 A Well he had a bad habit of showing up late. This is 5
8 o'clock in the morning. The guy had the key to the dry
9 goods area. If he was late, we waited.

10 Q Did you punch in in the lunchroom when you'd first come
11 in?
12 A There was no punching in the lunchroom.
13 Q You didn't punch in in the lunchroom, right?
14 A You can't punch in in the lunchroom, there is --
15 There's a time clock in the lunchroom, isn't there?
16 A When did they install that?
17 There wasn't a time clock in the lunchroom?
18 A No.
19 So you never punched in in the lunchroom?
20 A Never.
21 Did you always punch in, from December of 1997 until the
22 time you left Barber Foods, did you always punch in on the
23 meat room clock in the meat room?
24 A Yes, and on the production floor clock, yes.
25 So do you have a name -- do you remember the name of the
[page 18]
1 guy that you usually had to obtain the key from?
2 A Who's that guy that was at that -- at the beginning or the
3 week? That was the guy. What was his name? The one you
4 took the deposition Tuesday, I believe it was?
5 MR. DIXON: Was it Kevin?
6 THE DEPONENT: Kevin, there we go.
7 MR. DIXON: Kevin Snow?
8 THE DEPONENT: Yeah, him.
9 Q Kevin Snow was the guy that you usually got the key from?
10 A Yeah.
11 Q How often -- you usually arrived at work at around 5
12 o'clock, right?
13 A Um-hmm, yes.
14 Give or take a minute or two either way?
15 A Yeah, yes.

16 And then you'd have to get the key from Kevin Snow, right?
17 A Yes.
18 Was he the only one who had a key?
19 A The only one that had a key that would let me have it
20 without having a discussion or an argument or a, Oh come
21 on, type.
22 Who else had a key?
23 A Let me see. Zareh. Let's see.
24 Who else that was there at 5 o'clock when you got there?
25 A Zareh. He was there -- always there at 4:30. He had a
[page 19]
1 key, and let's see, the other guy was Bob Lorrane
2 (phonetic). And then Doug Goodwin had access to the key
3 to the locker but not the key. They had this locker in
4 the management office, okay, that consisted of all the
5 keys to the plant in case you needed the keys, but you had
6 to have a special key to open it up. They called it the
7 key locker. So if you couldn't get in you had to tell
8 Doug, you had to get your gear, you had to hunt down Doug
9 who was in his office, tell him, you had to go into the
10 management office, unlock the key locker, get out the key
11 to the dry goods area, go down there and unlock it, let us
12 in.
13 Q And how frequently would it be that when you arrived at
14 work the dry goods door would not be open and that you'd
15 have to hunt down somebody to get a key?
16 A Once a week most of the time.
17 Well wait a second, once a week most of the time?
18 A Yeah.
19 Q Once a week to me -- how many days of the week did you
20 work?
21 A Five to six.

22 If you worked five to six days a week, once a week, I
23 guess at least the way I interpret it, is not most of the
24 time. In fact, it's least of the time. So which one --
25 A At least once a week then cause we were working on
the day
[page 20]
1 that he had off, which was usually Saturday. That would
2 be the day you couldn't find him.
3 Q So, you know, during the week --
4 A (Indiscernible)
5 Q During the week, Monday through Friday, --
6 A Okay.
7 Q -- if you showed up at 5 o'clock, the door was usually
8 open so you could go in get your stuff, right?
9 A No, had to be locked in accordance to the fact that
10 management was afraid of people going in there, helping
11 themselves, and stealing.
12 Q Well when you told me that it was about once a week
that
13 you would have to hunt somebody down to find your key,
14 what did you mean?
15 A Kevin Snow was usually there. When Kevin Snow was
not
16 there, then you'd have to do the key hunting and find
17 someone else to open up the door for you.
18 Kevin Snow was usually there, right?
19 A Yes.
20 Q And how many -- if you had to give me an estimate of
the
21 number of times per week that Kevin Snow was not there,
22 since he was usually there, how many -- and you had to
23 hunt somebody else down, how many times would that
happen?
24 A Twice.
25 Maybe twice a week?
[page 21]
1 A Yes.

2 Q Now once you went in and grabbed your stuff in the dry
3 goods, whatever you were getting there, where would you
4 go?
5 A Well, go punch in. After we'd put on the stuff we'd run
6 upstairs.
7 Q And that's -- I'm trying to take you step by step. At
8 some point you go to your locker, right?
9 A Yeah, that's right.
10 Q After you went to dry goods and picked up whatever
you
11 were picking up at dry goods, what would you do?
12 A Go to the locker, take off my street shoes, put on the
13 boots, make sure I had the bump hat, safety glasses, check
14 over, make sure they didn't get scratched or damaged,
15 clean them if necessary, proceed to put on the coat and
16 gloves and stuff in my pocket, put the earplugs, safety
17 glasses in the pocket, you put the shoes in the locker
18 along with winter coat if it was the winter, lock up the
19 locker, and grab my box and get ready to go upstairs.
20 Q And the box, when you say grab your box, that's the
box
21 that contained the extra gloves and --
22 A Yes.
23 And then would you go straight -- would you usually go
24 straight from the locker upstairs?
25 A Yes.
[page 25]
1 Q And when you'd open the door, the first thing you would
do
2 is dip your gloved hand in the iodine bath, right?
3 A Yes.
4 Q And then you'd proceed across the floor to the meat
room,
5 right?
6 A Yes.
7 Q And then the next thing you would do is swipe your card
in

8 the time clock?
9 A Punch in, yes.
10 Q Now did you have your apron on when you entered the
11 production floor?
12 A Oh yes, you can't tie that apron with the gloves.
13 Now let's talk about the -- once you actually got the key,
14 okay, or on the days when the dry goods thing was open,
or
15 once you got the key and you actually got in there, okay,
16 right in front of the rack where all the coats -- where
17 the coats were, and the hairnet and the earplugs, the
18 stuff that you had to get every day, okay?
19 A Right.
20 How long did it take you to just grab that stuff before
21 you could head to your locker? I'm not talking about
22 putting it on yet, I'm just saying you're already there,
23 how long did it take you to grab the stuff that you
24 needed?
25 A Oh, three to four minutes.
[page 26]
1 Q There wasn't any line there, right?
2 A No.
3 Q It takes you three or four minutes to grab that stuff, to
4 grab your coat, your hairnet, your apron, and your
5 earplugs?
6 A Well yes, because the rack itself is not basically -- they
7 packed clothes -- they packed as many uniforms on it as
8 they can. Because you're the first one there, you have to
basically do a little force job in order to get a single
10 hanger free so you can pull out your one coat.
11 Q It'd take you about three or four minutes to do that?
12 A And then you have to go through and you have to get
the
13 gear and stuff, and go out --
14 Q Well what gear and stuff? Tell me specifically what you
15 had to get.
16 A The hairnets, the earplugs, the gloves, and the liners.

17 Okay, I just want to make sure. If you think it takes you
18 three or four minutes, I'll accept that. I just want to
19 make sure that's your answer.
20 A Yeah, three minutes, yes, for that.
21 And then you go over to the locker. How long does it take
22 you to walk from dry goods to your locker?
23 A I never timed it.
24 Can you even give me an estimation?
25 A No, I cannot because I am not that good at estimating
[page 27]
1 walking times.
2 Q Once you arrive at your locker and you've got the stuff
3 that you picked up at dry goods, from the time you
4 actually arrive at your locker until you get all the stuff
5 on so that you're ready to leave to go upstairs, how long
6 does that take?
7 A That would be five minutes.
8 Q And how long did it take you to walk upstairs afterwards
9 to where you punch in?
10 A That would all deter-- you determined if the cleaning
crew
11 had set up water damns or not, because you, you know,
you
12 have to be careful to walk through water and puddles so
13 you don't slip, have slip and fall accidents. And it
14 varied. You know, sometimes five minutes.
15 To actually walk from your locker to the meat room
clock?
16 A Oh, you know, if they -- the sanitation crew is not doing
17 their job, they ended up having soap running down those
18 stairs and they ended up being turned into a nice little
19 slippery mess that the cleaning crew ends up having to
20 clean up before the production staff shows up, but if at
21 the time there's no one in a real rush to pick up all that
22 soap, that ends up sitting there.
23 So what's the average time it took you to walk from your
24 locker to the meat room clock?

25 A Five minutes.
[page 28]
1 Q Now at the end of the day when you're done, what clock did
2 you punch out on?
3 A The same clock I punched in on, the one that's in
4 production.
5 Q The one in the meat room?
6 A Yup.
7 Q So you would punch in -- punch out on the same clock that
8 you punched in on, right?
9 A Yes.
10 Q Then what would you do?
11 A Punch out and leave. Proceed and go down the same stairs
12 I came up in the morning, go down there -- they had
13 separation bins, one for the white coats, a trash can for
14 the disposables. Then after that you end up walking to
15 the locker room, you deposit the stuff that you have to --
16 oh wait, sometimes they had to wash the boots cause of --
17 I don't know how to describe it, slime, chick-- you know,
18 you ever do a chicken, sometimes you got that grease or
19 slime off of a chicken, that always hits the boots, so you
20 have to wash the boots. And then you put the boots away,
21 put the bump hat, the safety glasses, and retrieve the
22 coat and shoes, and then leave.
23 So on the -- I take it on the way to your locker, once you
24 leave the production floor, from the door leaving the
25 production floor until you get to your locker, you get rid
[page 29]
1 of your white lab coat, your hairnet, your rubber gloves,
2 your cotton glove liners, and your earplugs, right?
3 A Right.
4 Q And the ones that you have to deposit in a laundry bin
5 would be the cotton glove liners and the white coat,
6 right?

7 A Right.
8 Q Where were those laundry bins located?
9 A Usually at the bottom of the stairs.
10 Q And the ones that you'd throw away every day would be your
11 hairnet and your earplugs and your rubber gloves, right?
12 A Right.
13 Q And where did you usually throw those away?
14 A They were right next to each other.
15 Q So they'd be at the bottom of the stairs, too?
16 A Yes.
17 A trash bin, disposable laundry bin?
18 A Yeah.
19 Now did you usually -- how did you usually do that, did
20 you usually just sort of walk down the stairs, get in
21 front of those bins, and then kind of take everything off,
22 or were you taking stuff off as you're walking down the
23 stairs?
24 A No, I'd walk down the stairs and take it off there because
25 at the time when you get out there your boots are greased,
[page 30]
1 okay, and you have to watch yourself walking on the stairs
2 in the chicken fat that's on the boots.
3 Q When did you take your gloves off?
4 A Down at the bottom of the stairs.
5 Q You'd always keep your gloves on until you got down to the
6 bottom of the stairs?
7 A Yeah.
8 You wouldn't take them off --
9 A I think I took the blue ones off.
10 Q I mean after you swipe, you didn't take your gloves off to
11 -- as you're walking across the production floor or down
12 the stairs?
13 A Yeah, that I would mostly do.

14 Q Mostly. Mostly you'd take your gloves off before you ever
15 got to the bottom of the stairs, right, do that while
16 you're walking?
17 A Yeah, but you're on the production floor when you do that.
18 But you'd still do it while you were walking, right?
19 A I don't understand where that's leading.
20 I'm not sure I'm leading anywhere. You'd take your gloves
21 off while you're walking ordinarily, wouldn't you?
22 A Yeah.
23 Okay, that's the only point I was trying to make. Now how
24 long did it take you to actually take your gloves off?
25 A Oh, the gloves? A couple seconds.
[page 31]
1 Q How long does it take you to take your hairnet off?
2 A Well, once you get to the bottom of the stairs all that
3 was about three minutes.
4 Q How long does it take you - - estimate for me - - you said
5 it would take you a couple seconds to take your gloves
6 off, right?
7 A Um-hmm.
8 Q How long do you think it takes you to take your hairnet
9 off?
10 A A few seconds, I would say.
11 Q And how long do you think it takes you to take your
12 earplugs off?
13 A Almost the same time.
14 Q Would that be a few seconds again?
15 A Yeah.
16 Q How long does it take you to take your coat off?
17 A Well, first I have to take the apron off.
18 How long does it take you to take your apron off?
19 A Well, if a knot got bunched up it'll take a little longer,
20 but thirty seconds.

21 Now how about your coat?
22 A About thirty.
23 So if we add all that up we've got let's say thirty
24 seconds for the coat, approximately thirty seconds for the
25 apron, and a few seconds each for the -- you know, maybe
[page 33]
1 Q -- as it does to take it off?
2 No, it takes a little longer to put it on.
3 Q About how much longer do you think it takes to put it
on?
4 A About a minute-and-a-half longer because you have to
check
5 it to make sure that the stuff you're putting on is not
6 torn, broken, needs replacing, worn out, because the white
7 cotton liners are u-- they recycle those, they keep
8 washing. Sometimes when you're grabbing you don't
realize
9 there's a hole that ends up ripping bigger when you put
10 your hand in it, and the next thing you know you have to
11 go back and get another one.
12 Q So let's -- you've now dropped this stuff off that
13 belonged to the bin, and the -- the trash bin, okay. And
14 you're going from there to your locker, right?
15 A Right.
16 Q And I take it when you arrive at your locker you've still
17 got your rubber boots on?
18 A Um-hmm.
19 And you've got your back belt, bump hat and safety
20 glasses, right?
21 A Right.
22 Anything else?
23 A No.
24 Now have you -- usually as you're walking to your locker,
25 do you ever take your safety glasses or bump hat off?
[page 34]
1 A Yes.
2 Q You'd usually do that after you dropped your -- the stuff

3 off in the trash and the laundry bin, while you're walking
4 between there and the locker room, you usually I take it,
5 the normal practice would be to just take your hat off and
6 take your safety glasses off, right?
7 A Yes.
8 Q So when you get to the locker, what you've got left is
you've got to take your back belt off and your boots off,
10 right?
11 A Right.
12 Q How long does it take you to take your back belt off?
13 A Thirty seconds.
14 Q And how about your boots?
15 A Well, if I didn't -- they didn't go through washing
them,
16 about thirty seconds.
17 And if you had to wash them, where would you do that?
18 A Where would I do that?
19Q Yeah.
20 A Let's see. Usually a washing sink.
21 That was where?
22 A At the top of the stairs.
23 Oh, you'd do it at the top of the stairs before you came
24 down the stairs?
25 A Yeah, if they needed it.
[page 35]
1 Q If they needed it. And how often would they need it on a
2 typical week?
3 A That one varied. It depended on the product that was
4 being made, how much excess marination got spilled, was
5 the chicken extra, you know, had extra, you know,
6 runniness that day cause -- depending on how consistent
7 [sic] frozen or fresh it was determines how much fat or
8 grease you're stripping off.
9 Q Is there any way you can give me any estimation at all
10 that you feel comfortable with about how many times a
week
11 you'd actually have to stop and wash your boots on the

way
12 downstairs?
13 A Comfortably three days, at least three days a week.
14 Q And you say those were outside the production floor at the
15 top of the stairs, right?
16 A No, no, that one was inside the production floor.
17 oh, inside the production floor. Was it inside the meat
18 room or just inside the production floor?
19 A Production floor.
20 So you'd punch out at the meat room, --
21 A Yes.
22 -- walk across the produc-- well where on the production
23 floor was it?
24 A Right next to the exit.
25 And when you say sink, I mean what do you mean?
[page 36]
1 A Deep stainless steel sink.
2 Q What do you do, walk into it?
3 A No, I end up balancing on one foot, take the boot off and
4 proceed to put it under the stream.
5 Q And then there'd be like a hose that you just --
6 A No.
7 Q You take the boot off, --
8 A The pedals are on the floor and you'd have to balance and
9 hit one foot on the water while you're doing that.
10 There's no hand pedals in that place, it's all foot.
11 Q Okay, so you'd actually operate the water with a foot
12 pedal?
13 A Yes.
14 Q So you take one boot off, --
15 A And you're balancing while I had one foot on the water,
16 and you're rinsing the boot off.
17 Q How long do you think it took you to do that?
18 A Well that deter-- that depended on how dirty the boot
was.

19 -Q Can you give m a range of like the least amount of time,
20 you just had to wash it a little bit, as opposed to - -
21 A Five minutes.
22 It would literally take five minutes sometimes?
23 A Yes.
24 What's the least amount of time?
25 A That is the least amount of time.
[page 37]
1 Q What's the most amount of time?
2 A Fifteen.
3 Q So you're telling me that sometimes at the end of the day
4 you literally would spend fifteen minutes at that sink
5 washing boots?
6 A Yes.
7 Q Now after you removed your stuff to the locker and put it
8 in the locker, how long would it take you -- let me
9 withdraw that. Let's go from -- can you give me an
10 estimate on days where you didn't have to wash your boots,
11 okay, where you'd just, you know, punch out, go
12 downstairs, throw the stuff away and go to your locker and
13 then out the door, from the time you swiped your card,
14 punched out, until you're out the door, the plant exit.
15 How long did that generally take?
16 A Well depending on floor traffic, if I had to dodge a lot
17 of people, no more than five minutes maximum.
18 So on days that you did not have to wash your boots, it
19 generally, normally took you about five minutes from the
20 time you swiped your card until you were actually out the
21 door?
22 A Yes.
23 And I take it there could be some variables in that
24 depending upon how crowded the hallways are.
25 A And the locker room.
[page 38]

1 Q The hallway and the locker room, right?
2 A Right.
3 Q But that would be the average?
4 A I'd say. that would be the average.
5 Q And how much of that time -- if you were to just -- let's
6 assume for a minute that you worked the same place you
7 work and you didn't have to wear any gear, you could just
8 swipe your card and go right straight down the stairway,
9 out the plant. How long do you think it would actually
10 take just to walk, walking time?
11 A Two minutes.
12 Q Now on days when you would actually have to stop and
wash
13 your rubber boots, can you give me an average amount of
14 time that you think it would take from the time you swipe
15 your card until you get everything done and you're out the
16 plant door?
17 A Well, if the boots are extremely dirty I'd end up being
18 twenty minutes; if they weren't, I'd end up being ten.
19 Q I take it the walking time is the same?
20 A Yeah, about the same foot walking time.
21 Did you get a lunch break in the meat room?
22 A Yes.
23 And how long was your lunch break?
24 A Thirty minutes.
25 And what did you -- other than the obvious, which is
[page 39]
1 eating lunch, what did you usually do during your lunch
2 break?
3 A Well I never left the cafeteria.
4 Q You normally would not leave the cafeteria?
5 A No.
6 Q You didn't go outside and smoke?
7 A No.
8 Q And who kept track of your lunch break?
9 A Doug.
10 Q Doug Goodwin?

11 A Yes.
12 Q Do you -- from December 1997 until the time that you left
13 Barber Foods, are you claiming that Doug Goodwin on
14 occasion would shave your lunch breaks, that you didn't
15 get your full thirty minutes?
16 A Yes.
17 How many times?
18 A That was basically -- it was -- determined half the time
19 by production, what the production needs were.
20 Q Explain that to me.
21 A Well, if the production was working very hard on the meat
22 and stuff, you ended up losing time because your breaks
23 were, you know, staged at a set level and if you didn't
24 leave on time, it was tough luck.
25 Now in addition to a lunch break, what other breaks did
[page 40]
1 you get?
2 A The fifteen-minute and ten-minute.
3 Q But with respect to the lunch break itself, are you
4 telling me that you think there were occasions where you
5 did not actually get a thirty-minute lunch break?
A Yes.
7 Q How many times do you think that happened?
8 A By month or week?
9 Q Let's try by month.
10 A I'd figure at least five times.
11 Q You think at least five times a month?
12 A Yes.
13 Did you ever complain to anybody about that?
14 A What good is complaining? No one listens.
15 Did you ever complain to anybody about it?
16 A Yes.
17 Who did you complain to?
18 A Doug.
19 Anybody else?

20 A Mentioned it to Bob Lorrane.
21 Anybody else?
22 A No.
23 What was Doug's response?
24 A Doug's response was he's just doing what management told
25 him to do.
[page 41]
1 Q What was Bob Lorrane's response?
2 A Go talk to Doug.
3 Q And on those approximately five occasions per month that
4 you believe you did not get your full thirty minutes, how
5 much time do you think you lost; in other words, how long
6 do you think your lunch break actually was as opposed to
7 thirty minutes?
8 A Twenty.
9 Q That's your best estimate?
10 A Yes.
11 Q Did you ever keep track of it?
12 A Yes, but I don't have the record anymore.
13 Q When you say "yes but you don't have the record anymore",
14 well what did you do to keep track of it?
15 A I wrote it down in a little booklet.
16 And what would you write down?
17 A The time I punched in, the time I punched out.
18 And how long did you keep that booklet?
19 A Until the day I quit.
20 And what type of booklet was this; was this a --
21 A Just a calendar book.
22 And what you'd do is the time you, what, punched in in the
23 morning and punched out in the afternoon?
24 A No, I'd be recording how much they shaved my lunch break
25 off

[page 42]
1 Q Oh, okay, so you did it for the specific purpose of
2 recording now much time was shaved off your lunch
break?
3 A Yes, but I ended up shredding it.
4 Q Why did you do that?
5 A Because I left Barber Foods in a not-so-nice-of-a-spirit,
6 and basically was stressed out, and I had myself a little
7 stress relief scenario.
8 Q Which was to shred evidence that you could use to
maybe
9 hold Barber Foods liable for Wage and Hour violations?
10 A No, basically I shredded everything, you know, receipts
--
11 you know, Barber Foods has a good way of burying
12 everything.
13 Q And how soon after you left Barber Foods did you
actually
14 get rid of this notebook or calendar --
15 A That day.
16 Q -- that you actually kept track --
17 A That day.
18 Q And for how long back had you been keeping that
calendar?
19 A Only a year.
20 Were you ever required to visit the medical office during
21 a lunch break?
22 A No, but it was recommended.
23 Who recommended it?
24 A Zareh and Doug.
25 Didn't you have to -- if you had to visit the nurse,

Exhibit 5

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, et al,	*	
	*	
Plaintiffs,	*	
	*	
v.	*	CIVIL NO. CV-00-371-P-C
	*	
BARBER FOODS,	*	
	*	
Defendant.	*	

DEPOSITION of ABDELA TUM, was held at the law offices of Kelly, Remmel & Zimmerman, 53 Exchange Street, Portland, Maine, on October 25, 2001, before Roxanne DiMarco, a Notary Public in and for the State of Maine.

APPEARANCES:

For the Plaintiffs:	Charles Dixon, Esq.
For the Defendant:	Graydon G. Stevens, Esq.
Translator:	Ghezai Menelik

[page 10]
1 A Yeah.
2 Q --have to put on a beard cover?
3 A Yeah.
4 (Short interruption; the deposition continued:)
5 Q Do you wear rubber gloves every day?
6 A Yeah.
7 Q Do you wear the cotton glove liners every day?
8 A Sometimes. I mean I--I do now, yes, it's cold, then I do
9 it, yes.
10 Q Are there times when you don't use the glove liners?
11 A When--after break, or first--the--for break, I have to,
12 you know, sit my stuff and need to be touched by like

13 (Indiscernible) and then I do, and after break I take it
14 off, (Indiscernible) the gloves.
15 Q So do you use the glove liners depending upon--You always
16 use the rubber gloves, is that right?
17 A Mostly.
18 Q Mostly?
19 A Yeah. I mean usually, yes, rubber gloves because I'm
20 housekeeper and I have to, yes.
21 Q Okay. And then I take it you use the cotton liners
22 depending upon how cold it is?
23 A First thing in the morning.
24 Q Do you always use an apron?
25 A Apron?
[page 16]
1 Q What is the--what do you wear on the first shift that you
2 didn't wear on the second shift, or what did you wear on
3 the second shift that you didn't wear on the first shift?
4 A I'm in second shift production--
5 (Deponent and Translator converse.)
6 THE TRANSLATOR: Okay. The first shift there are
7 eyeglasses, there were eyeglasses, but second shift they don't.
8 And to get your items, in the second shift you have to wait a
9 long time. I think they are--they line up--
10 A They line up.
11 THE TRANSLATOR: --a little bit.
12 A Yeah.
13 THE TRANSLATOR: They line up.
14 (Deponent and Translator converse.)
15 THE TRANSLATOR: And also they have to wait a long
16 time in the second shift for parking. Parking problem. They
17 have parking problem.
18 Q Abdela, where do you--where do you get your white coat?

19 Where do you pick up your white coat every day?
20 (Deponent and Translator converse.)
21 THE TRANSLATOR: We pick it from the cage. The cage
22 is along the (Indiscernible) side, on the other side of it.
23 That's where we pick it.
24 Q Let me--I'll do it this way. You get your--do you get
25 your white coat from a rack?
[page 19]
1 after you became a production associate or a housekeeper.
2 Okay?
3 A Okay.
4 Q Did you have a locker?
5 A Yeah.
6 Q What did you keep in your locker?
7 (Deponent and Translator converse.)
8 THE TRANSLATOR: His work clothes. My work clothes.
9 Q What work clothes?
10 A The blue coat.
11 Q Do you wear that blue coat under--
12 A Yeah. White. White coat.
13 Q And is that your own blue coat or did the company buy
that
14 for you?
15 A No, I buy it from the--
16 Q And that's to keep you warm?
17 A Yeah.
18 Q Is there anything else that you keep in your locker?
19 A My hat.
20 Q That's the bump hat.
21 A Safety glass.
22 Q And your safety glasses. Do you keep your back belt
23 there?
24 A Yeah, belt--belt also.
25 Q Do you keep any tools there?
[page 22]
1 Q Which--which entrance do you cone into the plant in?
2 A Most of the time--before I used down the side. Now

there's a parking problem, was construction. After
construction, mostly we don't got to park so we park
everywhere on the streets. But--or usually I park beyond
parking.
Q Let me show you a map and ask you to tell me which--
A Yeah.
Q --which entrance you usually--And I--I know there were
some changes with- I
A Yeah, changes.
Q --while the construction was going on, but which one
you
usually come in, if you can. And I'll tell you--I'll--
I'll try to show you. This is the--this will help you
out. This is the ground floor.
A Yeah.
Q Here's the cafeteria.
A Yeah.
Q There's the cage.
A Yeah.
Q Here's the entrance by the cafeteria with the hallway
that
goes up, and here's the entrance over by the stairways
that--that are by the cage. Do you--did--Where do you
usually come into the plant?
A Like I say, right now, after construction, we can find to
[page 23]
park this side, we're gonna come this way. All right.
But I usually park this side.
Q If you usually--you usually park on the St. John Street
side.
A Now, now, after the construction, St. John Street, but
before, for year and year and year, the big parking, the
end, the parking say shipping-receiving, you know.
Q Over by shipping and receiving.
A That's right. That's where I park, I was, but now there's
no place so I have to go back again to find no streets
parking and park in the street and I go back.

12 Q And then once you park on the street, which--do you
13 usually come in on the street entrance?
14 A When I park on the street, I have to get the street--it's
15 St. John Street? (Indiscernible) Street.
16 Q Sorry. So you come in the entrance on St. John Street
17 now.
18 A Now. Right now.
19 Q Okay. And--and how long have you been doing that?
20 A Maybe a month, month-and-a-half, sometimes. I--I
mean not
21 usually. Sometimes. If I get--got to find to park, I
22 park over there. If I find--if I find park, I park down.
23 Q And so for approximately a month or a month-and-a-
half-
24 A Yeah.
25 Q --you've been coming in the St. John Street-
[page 27]
1 Q When you went to the locker would you put all that stuff
2 on, before you went to the cage?
3 A Yes. Sometimes I--I mean I will wear it, I'm trying to
4 get locker, and then I wear my coat out and then sometimes
5 I--yeah.
6 Q I--if I remember correctly, in your locker you kept your
7 blue coat.
8 A Yeah.
9 Q Safety glasses.
10 A Yeah.
11 Q Bump hat.
12 A Yeah.
13 Q And back belt. Is that right?
14 A That's right.
15 Q How long did it take you to put on those items?
16 A Depend, like from eight, fifteen, till ten minutes if--
17 sometimes, you know. All things, to go upstair, right?
18 Q No.
19 A Mmm.
20 Q All I'm asking you about right now-

21 A Yeah.
22 Q --is those four things- 2
23 A Yeah.
24 Q --that you kept in your locker.
25 A Yeah.
[page 28]
1 Q When you would come in and go to your locker and get those
2 four things.
3 A And then to go punch? Okay.
4 Q No. I'll ask you about that later. These four things.
5 How long did it actually take you to put on your back
6 belt, put on your safety glasses, put on your bump hat and
7 the blue coat? Your best estimate of how long it would
8 take you to do that.
9 A Eight minutes.
10 THE REPORTER: How many?
11 (Deponent and Translator converse.)
12 THE TRANSLATOR: Eight to ten minutes.
13 Q And after you put that stuff on,-
14 A Yeah.
15 Q --you would next go to the cage?
16 A Yes.
17 Q And from the cage, you would get--well, did you usually
18 pick up the white coat from the rack before--
19 A Yes.
20 Q --you got the stuff from the cage or after you got the
21 stuff from the cage?
22 A White coat?
23 Q Yes.
24 A After I dress, and then-
25 Q Okay. I understand that. But from the locker,-
[page 29]
1 A Yeah.
2 Q --from your lockers to the cage, did you usually pick Up
3 the white coat on the way--

4 A Oh.
5 Q --to the cage?
6 A Yeah, first white coat and then I go to cage.
7 Q How long do you believe it actually took you to pick your
8 white coat off the rack and put it on and button it up?
9 A Before I go to cage?
10 Q Yes. Just-
11 A Just white coat.
12 Q Just the white coat.
13 A Say minute-and-a-half. Sometimes. There's people around
14 you and stuff, some of--you know, as--depending.
15 Q And the--and then at the cage you would actually pick up a
16 hairnet.
17 A Glove, white glove. I mean blue glove.
18 Q Hairnet, beard cover, blue glove,--
19 A White tie.
20 Q --and earplugs, right?
21 A Yeah. Is white ties, there's moustache.
22 Q When you say white-
23 A White tie. I usually take white tie with me, yes, for all
24 my job. White ties, is it-
25 (Deponent and Translator converse.)
[page 30]
1 THE TRANSLATOR: He calls a white tie, but that is
2 used for tying whatever he ties with. This is for tie, it's a
3 kind of string, for line up. So he picks it up. It's white.
4 Q Is that something that you bring yourself from home or is
5 that something--
6 A No, no. From Barber Food.
7 Q And where do you get that?
8 A From cage. White tie. I usually have white tie, twenty
9 white ties every day. Yeah.
10 Q The stuff that you get from the cage,-
11 A Yeah.

12 Q --the hairnet, the beardnet, the gloves, and the earplugs,
13 how long--do you usually put those on right there?
14 A Well, it depends. Sometimes people in front of me, I have
15 to wait, and well it, you know, maybe two, three minutes
16 sometimes, just get there and just have, you know, take
17 everything and then put it. Two or three minute, four
18 minute maybe. If I'm no rush.
19 Q On the first shift, Abdela, can you--what is your best
20 estimate of the usual waiting time that you have to get
21 whatever you need to get out of the cage?
22 A Cage is-
23 Q First shift.
24 A First shift, is like--maybe sometimes two minutes, three
25 minute. That's, you know, I got (Indiscernible) three
[page 31]
1 minutes and over that, just to go over there and have, you
2 know, sometimes two, three people, and sometimes on
3 person, and then I got there, wait, and then just take my
4 stuff.
5 Q How many people--In the first shift is there usually a
6 line?
7 A Not much.
8 Q At the cage?
9 A No, not like second shift. It's--
10 Q First shift, what is the--what's the typical line? If
11 there's a typical line, how many people generally are in
12 the line--
13 A Typically--
14 Q --on the first shift?
15 (Deponent and Translator converse.)
16 THE TRANSLATOR: Normally up to five people.
17 Q Normally up to five people.
18 A Up to.
19 Q On the second shift, when you--when you were production
20 associate on the second shift,-

21 A Yeah.
22 Q --normally how many people would there be in line?
23 A Like ten, twelve, sometimes.
24 Q Ten to twelve people?
25 A Yes.
[page 32]
1 Q Would that be a typical--would that be a typical day that
2 there would be ten or twelve people waiting in line on the
3 second shift?
4 A I remember the second shift, there was--everything came
5 closest, the way, (Indiscernible) , there was a lot of
6 people around. Once they come together and then just
7 stuck over there, that's what they do.
8 (Deponent and Translator converse.)
9 THE TPJNSLATOR: Eight to ten people. Typically
10 eight to ten people.
11 Q And when--when you're--when you were on the second
shift,
12 if there was that typical line of eight to ten people, how
13 long would it typically take you to reach from--to go from
14 the back of that line to the cage?
15 A Well it depends. Sometimes seven minutes, eight
minutes.
16 I'm not--I'm not timing at the time I was, but I give
17 eight minutes probably you're gonna wait, if there's a lot
18 of people around. First come, first serve, so--
19 Q After you get your stuff from the cage, what do you do?
20 A Go upstair.
21 Q Do you-
22 A For me, for housekeeper. So I go upstair, right away.
23 But other people, they go back to cafeteria.
24 Q So is--while you've been a housekeeper, anyway, once
you
25 pick up your stuff at the cage, you go right upstairs,
[page 38]
1 Q --at Barber Foods?
2 A Actually there's sometimes a line to wait, but after you

3 punch it, I punch out--
4 Q There's a. line--
5 A Yeah.
6 Q --sometimes to wait to punch out.
7 A Yeah.
8 Q But you're still being paid--
9 A That's right.
10 Q --before you punch out. Right?
11 A Yeah.
12 Q Okay. From the time that you actually make it through
13 whatever line is there and swipe your card, so you've
14 punched--so you've punched out--
15 A Yeah.
16 Q --until you--
17 A Out the- I
Q --until you're out the door by the cafeteria,--
19 A Yeah.
20 Q --how long do you usually--how long does it usually take
21 you?
22 A Well, punch out, and then take whole stuff, something like
23 glove you usually throw away, and then like white coat and
24 then white liner and then put it back where it belong, and
25 have to go locker, take your coat and whatever you wear,
[page 39]
1 like safety glass, coat, and hen put in your locker, you
2 know, close your locker, I can--like eight or nine
3 minutes.
4 Q So you say usually from the time. you actually swipe your
5 card--
6 A Yeah.
7 Q --until you leave the plant,--
8 A Yeah.
9 Q --it takes you about eight or nine minutes.

10 A Yeah. If I'm rush, yes, it take-
11 Q Okay. How long, if--if you didn't have to take anything
12 off,-
13 A Yeah.
14 Q --if you were wearing regular street clothes,-
15 A Um-hmm.
16 Q --from the time you swipe your card to go down the
stairs
17 and walk out the plant--
18 A (Indiscernible)-
19 Q --and out the door, how long do you think that would
take
20 you? If you didn't have to go to your locker, if you
21 didn't have to take anything off.
22 A Just straight?
23 Q Just straight.
24 A Maybe three minutes.
25 Q Now I want to make sure I understand where you take
[page 40]
1 everything of f and where--where you put it off--and where
2 you put it. While you're--while you're--before you
3 actually punch out, do you remove your--your sleeve
covers
4 on the production floor before you even punch out and
5 throw them away?
6 A After I punch out.
7 Q Okay. Do you take anything off and throw it away before
8 you punch out?
9 A No.
10 Q Okay. There are some trash bins where you can take off
11 your rubber gloves and your sleeve covers and throw them
12 away on the production floor, right?
13 A Sometimes, yes.
14 Q Do you ever do that?
15 A Well, when I punch out, glove I can throw away, yes,
but
16 you have white coat, all stuff, yeah. Only gloves can

17 throw away.
18 Q Okay. Before you punch out you can throw away your rubber
19 gloves--
20 A Just rubber gloves.
21 Q --and take your sleeve covers off and throw them away
22 too,-
23 A And (Inaudible)-
24 Q --right?
25 A Yes.
[page 41]
1 Q Okay. Do you ever do that?
2 Yes.
3 Q Do you do it--is--Is it most of the time? For example if
4 there's a line before you can--before you can actually
5 swipe your card, don't you most of the time take your
6 sleeve covers and your rubber gloves and throw them away
7 before you punch out?
8 A (Indiscernible) this, the blue gloves I--I do not throw
9 away.
10 Q How about your sleeve covers?
11 A (Indiscernible) work and then I come out. I mean sleeves
12 I take with me, right away outside. But I can do that, I
13 can throw, but I remember, you know, just punch out and
14 then all things. It's easy to get (Indiscernible) throw
15 away.
16 Q And then as you're--as you're heading down to go down the
17 stairs to your locker, do you throw away your hairnet,
18 beard cover, and earplugs?
19 A That's true.
20 Q The long hallway?
21 A Yeah.
22 Q So do you take those off while you're actually walking
23 down the hallway?
24 A While you're walking down the stairs there's a trash

25 barrel. You have to find trash barrel where--and throw
[page 46]
1 choices, I asked him--You are asking him which of these
do you
2 do? Am I right?
3 MR. STEVENS: Which is most typical of what he does.
4 THE TRANSLATOR: Yes.
5 (Deponent and Translator converse.)
6 THE TRANSLATOR: The dropping off whatever he have
as
7 he goes on was not the formerly, it just came as of late. But
8 before, long time ago, we used to just go to the end and
right
9 there we dropped everything.
10 Q So now--If I understood that answer right, I take it now,
11 while you've been a housekeeper, your normal routine is
to
12 start taking stuff after while--after you've swiped out,
13 while you're walking down the hail to the end, you're
14 taking stuff off, and if the trash bags aren't full you're
15 throwing it in them, and if they are full you wait until
16 you find one that's not full. Is that right?
17 A Yeah. Right now, yes. But talking about long term, like
18 say three months, four months ago, before new
19 instructions, they don't put any trash barrel in the
20 corner so we have to go down there, near cafeteria, you
21 have to take all your stuff, throw away, there's a barrel,
22 that's where you do. That's all I can say.
23 Q And then after you've thrown your stuff in the laundry
bin
24 and in the trash bins, then you go to your locker? Or do
25 you go to your locker first?
[page 49]
1 the--the entrance by the cafeteria where you--where you
2 usually walk through and go right straight up the spiral
3 II staircase where you usually go and swipe your card, how
4 long do you think it would take you to go from the

5 entrance up before you swiped your card?
6 A If I don't do locker or if I don't do anything, it would
7 take me five minutes.
8 Q Five minutes at the most?
9 A Yeah. Just white coat and then I go can right up,
10 (Indiscernible) this.
11 Q Okay. Is there normally a line in order to swipe in in
12 the morning? Not at the cage now, but--but up at the time
13 clock where you punch in, is there usually a line?
14 (Deponent and Translator converse.)
15 THE TRANSLATOR: Am I correct you are asking him if
16 there are people waiting on the line? Is that--of the--
17 MR. STEVENS: Is there usually a line at the time
18 clock--
19 THE TRANSLATOR: At time clock.
20 MR. STEVENS: --where he punches in.
21 THE TRANSLATOR: Yeah.
22 (Deponent and Translator converse.)
23 THE TRANSLATOR: Yes. There are people.
24 Q Even--even as a--You've been a housekeeper for almost
two
25 years?
[page 50]
1 A Are you asking me for me or for other people?
2 Q I'm asking you for you.
3 A Okay. For me is I have to go direct back out here, where
4 I punch out all the time.
5 Q Yes.
6 A For the other peoples I see they line up to punch in.
7 THE TRANSLATOR: Are you--
8 MR. STEVENS: I'll ask--
9 THE TRANSLATOR: --speaking of the morning time?
10 MR. STEVENS: Yeah.
11 Q In the morning, when you--when you punch in, as a
12 housekeeper--You've been a housekeeper for almost two
13 years,--
14 A Yeah.

15 Q --am I right? As a housekeeper when you punch in, you
16 punch in, you go right straight to the pack-out 2 line and
17 punch in, right?
18 A Um-hmm.
19 Q Is there usually a line that you have to wait for at pack-
20 out 2 to punch in?
21 A For me?
22 Q Yes.
23 A No.
24 Q Now in order to do that, you go by some of the other
25 lines, of--of the other time clocks where the regular
[page 51]
1 production line workers are, right?
2 A Yeah.
3 Q Is there usually a line waiting at the time clock for the
4 production workers?
5 A Yes. Absolutely.
6 Q This is in the first shift.
7 A Yeah.
8 Q Right?
9 A Yeah.
10 Q How long are those lines, usually, at those time clocks?
11 A Well, there's one group (Indiscernible) one group like
12 thirty people, twenty-five people, they have to wait at
13 the time clock, punch in and it say--it say thank you, you
14 have to wait a couple second, and then everybody just
goes
15 the same, maybe take 'em sometimes five, seven minutes
to
16 wait, the line. I don't know, that's what I see, it's
17 people that wait. Yeah.
18 Q Are you aware of any times since you've been a
production
19 worker, you know, after November 1997, that you haven't
20 gotten your full thirty-minute lunch break?
21 A No.
22 Q Have you been required--Have there been any

occasions
23 since you've been a production worker, since November
24 1997,--
25 A (Indiscernible)
[page 52]
1 Q I'm sorry.
2 A No, I mean (Indiscernible) and sometimes I miss, so
we've
3 got to tell him, to ask him.
4 Q Yeah. Since--since you've been a production worker or a
5 housekeeper in November 1997, have there been any times
6 when you have been required to visit the nurse's office
7 during your lunch break?
8 (Deponent and Translator converse.)
9 THE TRANSLATOR: Well, during the second shift, is
10 afternoon, they used to call him up to come by 2:15,--
11 THE DEPONENT: 2:30.
12 THE TRANSLATOR: 2:30?
13 THE DEPONENT: Yeah.
14 THE TRANSLATOR: 2:30. But where he's supposed to
15 come at 3:45?
16 THE DEPONENT: Exactly.
17 (Deponent and Translator converse.)
18 THE TRANSLATOR: To the nurse.
19 THE DEPONENT: Yeah, the nurse, sometimes.
20 Q So sometimes when you work on the second shift,-
21 A Yeah.
22 Q --while you were working on the second shift, an
23 appointment would be made for you to visit the nurse-
24 A Yes. Yeah.
25 Q --before the shift began, around 2:30,--
[page 53]
1 A Correct.
2 Q --is that right?
3 A Yes.
4 Q Since you've moved to the first shift, have you been
5 required to see the nurse or--or made an appointment to

6 see the nurse before your shift starts?
7 A No.
8 Q Okay. Have you had appointments made for you or been
9 required to see the nurse during your lunch break?
10 A With some people they do, but not me. Some people
they
11 do.
12 Q Has anybody at Barber Foods threatened you or
retaliated
13 against you in any way--
14 A Yes.
15 Q --because of your being a part of this lawsuit?
16 A Exactly.
17 Q I take it your answer is yes.
18 A Yes.
19 Q Okay. Who has done that?
20 A Well some-
21 Q I don't need to know what they did yet. What I'm--what
22 I'm going to do right now is I just want to get the names
23 of-
24 A Yeah.
25 Q --anybody that you believe has threatened or retaliated
[page 61]
1 shift actually starts?
2 A No. I punch in that time, and then I have to prepare all
3 my stuffs, you know, there is a lot of things to have to
4 prepare to--
5 (Deponent and Translator converse.)
6 THE TRANSLATOR: There are things that I have to
7 prepare before the production comes.
8 Q Okay. Has the cage operated in the same way for the last
9 four years, or have there been any changes?
10 A I believe maybe the cage, maybe three years? I don't
11 know. Something like this.
12 Q That's how long the cage has been there?
13 A Yes. (Indiscernible) remember it. But before that I
14 don't know, I was (Indiscernible) so-

15 Q So were there any changes in the way the cage operated in
16 the last three years?
17 A Yeah.
18 Q What changes?
19 A Change is you have to go cage and then get your stuff.
20 Before that was, you know, they put somewhere a
21 (Indiscernible) and then you can collect, you know, what
22 you need. But now they change, yes.
23 Q But since the cage has been open, have there been any
24 changes in the way it's operated or has it been the same
25 for the last three years?

Exhibit 6

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, et al.	),
Plaintiffs,	) Docket No.
	) CV-00-3 71-P-C
vs.	)
BARBER FOODS, INC.,	)
d/b/a BARBER FOODS,	)
Defendant.	)

30(b) (6) DEPOSITION of BARBER FOODS, INC. (Jeffrey David Shaw), taken pursuant to notice dated July 12, 2001, at the Law Offices of William C. Nugent, 75 Pearl Street, Portland, Maine, on August 13, 2001, commencing at 9:15 A.M., before Lisa M. Stiles, Registered Professional Reporter, a Notary Public in and for the State of Maine.

[page 19]

1 lockers in the maintenance room itself, so the maintenance
2 guys don't have any lockers there.
3 Q. Okay. All right. So with regard to personal
4 protective equipment that the maintenance workers wear, how
5 do they find out each day what personal protective
6 equipment they're supposed to be wearing for that day?
7 A Okay. Your term personal protective equipment, is to
8 me not - - from a maintenance standpoint, I don't think of
9 hair nets, beard nets, rubber gloves as personal
10 protective equipment. I think of that more as product -
11 protecting, so are you including all that?
12 Q. Right. Whatever they have to wear that is different
13 than their street clothes.
14 A. Okay. Every day, maintenance, when they come into the

15 plant, they're told that steel toed boots are required at
16 all times for maintenance. When you enter the production
17 areas, you have to have a hair net on every day without
18 exception. If you have a beard, you have to have a beard
19 net on without exception. And coveralls or a lab coat as
20 well as ear plugs and safety glasses.
21 Q. Okay. Those are what they always wear?
22 A. What they always wear.
23 Q. At least with respect to the beard nets and the hair
24 nets if they go in the production floor?
25 A. Yes, if they're not -- well, go ahead.
[page 20]
1 Q. And if they're not going on the production floor?
2 A. If they're not going on the production floor, they
3 have to use safety glasses and steel toed work boots,
4 that's it.
5 Q. They wear safety glasses regardless of whether they
6 are doing a job right then?
7 A. Uh-huh.
8 Q. Any time they're in the plant?
9 A. Any time they're in the plant as of, I think it was,
10 February -- it was around February or March of
2001 that we
11 implemented a safety glass policy throughout the plant to
12 try to cut down on injury rates.
13 Q. And prior to that -- I mean, how did that new policy
14 change the old policy, how was it different?
15 A. The old policy, safety glasses were not required
16 unless you were doing some form of spark producing
17 equipment task or any type of hammering, things like that.
18 Q. So these items that are -- are always required,
19 routinely required, are they issued to the maintenance
20 workers and they keep them or did they have to obtain
some
21 of them each day?
22 A. Every day, they have to obtain either a lab coat or
23 overalls, coveralls, as we call them. As far as steel toed

24 boots, they're issued them once a year. It's up to them to
25 make sure they get them on before they enter the
production

Exhibit 7
Deposition of: Helen Lamphier -- 8/15/01.

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MAINE
3
4
5 ABDELA TUM, et al.,)
6 Plaintiffs) Civil Action Docket
7 v.) No. : CV-00-371-PC
8 BARBER FOODS, INC.,)
9 d/b/a BARBER FOODS,)
10 Defendant)
11
12
13
14 DEPOSITION OF HELEN LAMPHIER, taken pursuant
15 to notice dated August 9, 2001, at the law offices of
16 William Nugent, 75 Pearl Street, Portland, Maine, on
17 August 15, 2001, commencing at 10:11 a.m., before
18 Jennifer A. Ridenour, a Registered Professional
19 Reporter, a Notary Public in and for the State of Maine.
20
21
22 APPEARANCES:
23 TIMOTHY B. FLEMING, ESQ., and
24 CHARLES R. DIXON, ESQ., FOR THE PLAINTIFFS.
25 GRAYDON G. STEVENS, ESQ., FOR THE
DEFENDANT.

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	Mr. Dixon	3
	Mr. Stevens	79
	Mr. Fleming	83

[page 7]

A. No.
Q. And what sorts of duties do you perform in the cage?
A. We pass out the supplies, like gloves, hair nets, earplugs, beard nets, and I pass out cook codes.
Q. Cook codes.
A. And other supplies for the machinery.
Q. Do you pass out anything -- anything else besides what you've just named?
A. There are several things in there, like scissors and different things, palletizing gloves.
Q. What is a palletizing glove?
A. It's those heavy gloves with the rubbery bumps on them.
Q. And which sorts of employees require those?
A. Actually, the ones that palletize are the ones that ask for those gloves.
Q. I guess I need a little edification. I'm not sure what palletizing is.
A. The boxes, once the boxes are packed, and then they have to put them on the pallets and stack them up.
Q. So are those shipping and receiving employees that need those, or are they line workers?
A. It's the rotating line workers. They're assigned different jobs every -- maybe every hour, two hours,

[page 13]

finish and then go ahead and answer the question.

2 So do you hand out the hair nets from behind the
3 cage? Do you have to give that to each employee as they
4 come up?
5 A. Yes.
6 Q. And beard nets the same way?
7 A. Yes.
8 Q. And what about the earplugs?
9 A. Same.
10 Q. Same thing?
11 A. Same way.
12 Q. And do you hand out -- in previous testimony we've
13 discussed protective sleeves that some employees wear.
14 Do you hand those out at the cage? First of all, do you
15 know what sleeves I'm referring to?
16 A. Yes.
17 Q. Do you hand those out at the cage?
18 A. Only the heavy-duty ones. The lightweight ones go
19 upstairs in a bucket because they need so many of them.
20 Q. And the heavy ones, can you describe those a
21 little bit for me?
22 A. Those they use in the meat room where they grind
23 the meat.
24 Q. And are those disposable?
25 A. They are disposable.
[page 14]
1 Q. So -- okay. So only -- only the meat room
2 employees require those sleeves?
3 A. Yes.
4 Q. So no other employees come to the cage to pick up
5 sleeves?
6 A. No.
7 Q. And aprons, do you hand out aprons at the cage?
8 A. Only the heavy ones to the meat room. The others
9 go in packages in the white buckets that they take
10 upstairs.
11 Q. And how many employees are -- work in the meat
12 room and require either the sleeves or the aprons?

A. We only have -- we only have one or two that ask for the aprons and sleeves.
Q. And how do you -- do you recognize those people by face and just give the equipment to them, or do they ask you for the equipment?
A. Those people ask.
Q. They ask?
A. Yes.
Q. Okay. So if an employee comes up -- if a meat room employee comes and asks for a protective sleeve, what is your next step?
A. Just go to the shelf and get a pair of sleeves for him.

[page 20]

other -- do you give out tools at the cage also?
A. Well, yes, I do. Cook codes.
Q. Okay. Can you explain what a cook code is?
A. It tells what the name of the product is, like Cordon Bleu or Kiev. We have so many it would be hard to name all of them.
Q. And how many employees come to the cage to pick up cook codes?
A. Four or five.
Q. Four or five. And where are the cook codes kept?
A. Right to my left at the window there's a shelf.
Q. And how do you know which cook code to give an employee who requests one?
A. They look at their paper to see what they'll be running that day. Then they ask for the certain cook codes. And everything is marked with a name on it, each drawer that holds the codes.
Q. So what do you mean by that?
A. We have little containers with all these separate little drawers, and on the front we have a paper with the name of the cook code or whatever numbers they need.
Q. So does each container have a separate cook code?

23 A. Yes, it does.
24 Q. So the employee asks for a certain cook code, and
25 then what do you do after that?
[page 21]
1 A. I just look for that cook code on the paper and
2 pull the drawer open. They usually want two at least,
3 so I get them two.
4 Q. Are there ever times when you look in the
5 container and the cook code that you're looking for is
6 not there?
7 A. Yes.
8 Q. And what happens under those circumstances?
9 A. We look on the spindles. We have spindles that
10 have the -- they're round and they have the long prongs
11 on them. The cook code slides up over the prongs on the
12 spindle, so usually we look on one of those and we'll
13 find the cook code.
14 Q. And where is the spindle located?
15 A. Right to my left on a lower shelf.
16 Q. And what is -- if the cook code is not in the
17 container where you looked initially, how far do you
18 have to reach to pick up a cook code from the spindle?
19 A. Down to knee level.
20 Q. Down to knee level?
21 A. Yeah.
22 Q. So how far laterally is it from where you're
23 standing?
24 A. Oh, I'm right there. Right to the shelf. That's
25 where I work, at the window. I mean, I could just –
[page 22]
1 the window is here. I can just reach. The shelves are
2 on this side.
3 Q. Okay. And are the cook codes organized by name on
4 the spindle?
5 A. It tells the name of the cook code on the spindle.
6 Q. And how is it marked?
7 A. The cook code itself has the name.

Q. Okay.
A. It's the only way I can find them, yes.
Q. Do you ever have to search around for the right cook code?
A. We no longer do that. There was a time when we would run out because the workers would not return them, and they have ordered plenty of them now.
Q. Okay. But is it difficult to find the correct cook code on the spindle? Is it -- well, strike that. Is it more difficult to find the correct cook code on the spindle than it is to find the right cook code in the drawers?
A. Oh, no. No. And it saves time for them because it's already on the spindle, if we find it that way.
Q. Okay. And then do some employees require metal detector sticks?
A. Yes, they do.
Q. Which employees are those?

[page 30]

Q. So you said a few show up at 2:30?
A. They start, yes.
Q. They start coming in at 2:30?
A. Yes.
Q. And then what time -- what -- typically what times do the people that come in early come in? They start at 2:30 and then how -- how do they come in after that?
A. Oh, they just come a few at a time, very few at a time.
Q. What time does second shift begin?
A. 3:45.
Q. Do you have any idea why employees would show up at 2:30 for a shift that starts at 3:45?
A. They're the ones -- there's not many. They're the ones that leave their cars at home because there are too many cars right there with all the construction, and they come -- some get a ride from wherever they're coming from. I have no idea.

19 Q. So you're not -- do I understand you to say that
20 you're not sure why they show up so early?
21 A. I am not sure, no.
22 Q. And what time do the bulk of the employees show up
23 at the cage?
24 A. They start pretty good around two forty-five,
25 three. It really starts getting busy at three.
[page 31]
1 Q. What do you mean by it starts getting busy at
2 three?
3 A. Busier. More steady coming to the window.
4 Q. Can you explain a little bit more what you mean by
5 steady?
6 A. Well, they're coming to pick their things up. I
7 have to stand by the window.
8 Q. Okay.
9 A. You know, you don't go and sit down because
10 they're coming. If I went to sit down, then there would
11 be somebody else right there.
12 Q. Okay. And when it's -- when it's busier, how many
13 employees are waiting to collect their equipment from
14 the cage?
15 A. Oh, there could be eight or ten.
16 Q. And which way -- well, maybe you can show me on
17 Exhibit 4, which is the production floor --
18 MR. FLEMING: That's not Exhibit 4. It's
19 just Diagram 4. We didn't put them in as exhibits.
20 BYMR.DIXON:
21 Q. Diagram 4. Is the cage on the production level or
22 is it on the lower level?
23 A. Lower level.
24 MR. FLEMING: Diagram 3.
25 BY MR.DIXON:
[page 36]
1 that hallway?
2 A. Yes. Yes.
3 Q. Okay. And how far to the left can you see?

4 A. There's a door right to the left.
5 Q. There's a door right to the left?
6 A. Yes.
7 Q. And then there are elevators straight ahead. So
8 you said that was about six feet?
9 A. I think it's a six-foot hallway, but there's --
10 like it sets back another foot or so --
11 Q. Okay.
12 A. -- built in like from the wall.
13 Q. So how long is the busy period at the cage?
14 A. A half hour.
15 Q. A half hour. So is there typically a line of
16 seven or eight people during the whole busy period?
17 A. It builds up some.
18 Q. Can you explain that a little bit more?
19 A. There are several people out there getting their
20 coats, but it's hard for us to distinguish whether
21 they're leaving from first shift. They go the same
way.
22 If they're coming down from Line 2, the hall is full
of
23 first-shift people.
24 Q. Okay.
25 A. And they're passing these other people.
[page 37]
1 Q. Okay. But just in terms of people waiting to get
2 their equipment from the cage, how many people would
you
3 estimate are waiting to pick up their equipment at the
4 cage during the busy periods?
5 A. Maybe eight to ten people.
6 Q. Eight to ten people?
7 A. It seems that way to me, yes.
8 Q. And for what period of time is the line comprised
9 of eight to ten people?
10 A. They're there and they leave and another bunch
11 will come up after they get their white coat or whatever

12 they're getting out in the hall.
13 Q. I guess I'm having a little bit of difficulty
14 understanding. Is it consistently a line of eight to
15 ten people during the busy time?
16 A. No, no. Not always. Not always. It varies. It
17 varies.
18 Q. How does it vary?
19 A. I've seen it almost down to the elevator -- to the
20 lockers.
21 Q. Okay.
22 A. The line.
23 Q. And how far away is that from where you're
24 standing?
25 A. That is 16 feet from the window to the locker. I
[page 39]
1 at that time?
2 A. It varies. Some days it could be up to 10, 15, I
3 think, in the line. Some days. But they don't all come
4 at once.
5 Q. But you said you've seen the line extend back as
6 far as the lockers?
7 A. Yes, but not -- not always packed in. You know
8 what I'm saying? Not always that way.
9 Q. Okay. So could there have been more employees
10 than that?
11 A. We don't always get a chance to look around the
12 corner. We don't always have the time for that.
13 Q. I understand. I understand.
14 A. Just we're too busy passing the stuff out.
15 Q. Sure. But you said that you've seen the line
16 extend back to the lockers, so I'm just trying to get an
17 idea of how many employees are in the line when it
18 extends back to the lockers.
19 A. It would be hard for me to say how many.
20 Q. Okay. Well, you said that there are approximately
21 eight to ten employees --
22 A. Normally.

23 Q. Normally?
24 A. Yes. At one time. At one time.
25 Q. And what time frame are you talking about as
[page 40]
1 normally?
2 A. Well, when I've seen them, I have seen crowds in
3 the hallway. I have seen crowds out there, but at that
4 time of day--
5 Q. That's what I'm trying to get at. Which time?
6 A. It's very difficult to tell if they're leaving
7 from first shift or if they're all our crowd, you know,
8 on second.
9 Q. Which time of day are you talking about?
10 A. They start leaving at three.
11 Q. Whatdoyoumean-12
A. First shift.
13 Q. First shift starts leaving at three?
14 A. Yes.
15 Q. Now, I'm just trying to get at the line of people
16 there to either get equipment or drop off equipment.
17 A. Yes, I know, but they're all intermingled. That's
18 how -- that's the way they are. They just -- they're
19 sitting on the rail where the heater is. Some are
20 second-shift people. And the first shift is passing all
21 through them to get out, so it's --
22 Q. So if there are eight to ten people in line when
23 the line is -- in a typical busy time situation and then
24 you've estimated that there's at least 16 feet from the
25 window to the locker, when the line extends that far,
[page 41]
1 doesn't it stand to reason that there are approximately
2 twice as many employees in line?
3 A. Oh, at times, yes.
4 Q. Okay. How often does that happen?
5 A. Well, it's hard to say. The lockers are over that
6 way, and see, the people are at the lockers so I don't
7 know if they're always in line or at the lockers.

8 Q. Okay. And then during the busy times, do you have
9 a chance to look down the hall regularly?
10 A. Yes, just an easy glance out through.
11 Q. Just an easy glance?
12 A. Look in the mirror.
13 Q. When it's busy, are you working hard to make sure
14 people get their equipment?
15 A. When it's busy, yes.
16 Q. When it's busy. So you don't --
17 A. Definitely, yes.
18 Q. So you don't always have a chance to look down the
19 hallway?
20 A. That's right.
21 Q. So you might not always know how many people are
22 in the line?
23 A. That's right.
24 Q. So it could conceivably be more than what you've
25 estimated here today?
[page 42]
1 A. Yes.
2 Q. Does somebody else work with you in the cage?
3 A. Yes.
4 Q. What is that person's name?
5 A. Sharon Jenkins.
6 Q. And what does Sharon Jenkins do?
7 A. It's basically her job in there. I'm just her
8 helper.
9 Q. So what does -- what does Ms. Jenkins do that you
10 don't do?
11 A. The same things. The very same thing.
12 Q. So both you and Ms. Jenkins do the exact same
13 things?
14 A. Yes.
15 Q. And when does she work in the cage?
16 A. She works from -- she works until eleven, I
17 believe, eleven or eleven-thirty at night, so she starts
18 maybe at quarter of three, quarter of three.

19 Q. Okay. So you leave to go work on the line and she
20 remains behind in the cage?
21 A. Yes.
22 Q. Okay. I'm understanding. Do you ever get pulled
23 away from your duties in the cage during the times that
24 you are supposed to work there?
25 A. No.
[page 66]
1 think I have any enemies there. I hope not.
2 Q. So what other sorts of conversations do you have
3 with employees?
4 A. Well, certain ones like to pick you out and tell
5 you their problems and you talk with them, you know.
6 They talk about everything, I mean, just all their
7 personal things and things you wouldn't want to repeat
8 and--
9 Q. You should be a bartender.
10 A. Really.
11 Q. So do they talk with you during the busy times?
12 A. No, no, because it's going too fast. See, we're
13 just -- there's a period of time there from three to
14 three-thirty when we're just -- it's moving. It's
15 moving.
16 Q. Do employees ever complain about having to wait in
17 line for equipment?
18 A. There's always somebody complaining. You can hear
19 people every now and then.
20 Q. What sorts of complaints have you gotten?
21 A. Wanting to know why things don't go fast, yeah.
22 Q. Can you remember any specific conversations, any
23 specific complaints?
24 A. No. Just come on, let's get this moving,
25 something like that.
[page 67]
1 Q. Why do you think they would say that?
2 A. Because somebody in front -- a lot of times they
3 will say they want -- these are temporaries that do this

4 to us. They need a green hat for the temporaries. They
5 will say blue, yellow, they'll point out these things,
6 and you don't know if they've been hired or not, so we
7 give them what they ask for. That takes that little bit
8 of extra, you know. You've got to change the hat again
9 for them, things like that. They'll say a nine if they
10 want an eight. And the temporaries are the only ones
11 that we really can't keep track of what they need. The
12 regulars we know pretty much.
13 Q. So the temporaries, you don't know what they want
14 because you haven't seen them before?
15 A. We've seen them all before, but we don't know if
16 the company has hired them to wear a blue hat for
17 training. See, they'll ask for any color. They ask for
18 the wrong size gloves, things like that.
19 Q. And that takes a little bit longer?
20 A. It doesn't take much longer.
21 Q. Just to straighten that situation out?
22 A. I mean, just reach quick, put it back and grab
23 another.
24 Q. You said that the temporary employees get hats.
25 Are those given out of the cage also?
[page 77]
1 Q. How often does that happen?
2 A. Maybe daily with one or two. And usually those
3 are temporaries.
4 Q. And do the temporaries wait in the same line for
5 equipment as everybody else does?
6 A. Yes, they do. Yes.
7 Q. They do. What time did you say you left the cage
8 to go work on the line?
9 A. It's according to what time the girl comes back,
10 the regular one. It's usually around four-thirty.
11 Q. Which regular one?
12 A. Four or four-thirty.
13 Q. Which regular girl are you talking about?
14 A. Sharon.

Q. Sharon Jenkins?
A. Sharon Jenkins.
Q. So is she there during the time that you're working there?
A. Yes, she is.
Q. And you said -- well, do you leave the cage when she comes back?
A. I leave the cage or I sit right there and take my break. Sometimes I stay in there for 15 minutes, and other times I go out and move my car or something like that.

Exhibit 8

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, et al,	*	
	*	
Plaintiffs,	*	
	*	
V.	*	CIVIL NO. CV-00-371-P-C
	*	
BARBER FOODS,	*	
	*	
Defendant.	*	

DEPOSITION of ZEGKA RADOVIC, was held at the law offices of Kelly, Remmel & Zimmerman, 53 Exchange Street, Portland, Maine, on October 25, 2001, before Roxanne DiMarco, a Notary Public in and for the State of Maine.

APPEARANCES:

For the Plaintiffs:	Charles Dixon, Esq.
For the Defendant:	Graydon G. Stevens, Esq.
Translator:	Dusan Bjelic

[page 8]

1 A Yes, I was picking up everything myself.
2 Q And where--where were those items located for you to pick
3 up?
4 A Coats were in the hail next to--to the lockers. And the
5 gloves were usually in cafeteria. Later they switched
6 gloves in a--some small room which was not far from--from
7 the lockers.

8 Q And how about the hairnet and the earplugs?
9 A The gloves, the net, [illegible]ugs, and the hat were all in that
10 small room next to the locker.
11 Q And during this time when--when you worked at Barber
12 Foods, when you had to pick up your coat, did you--was
13 there usually a line where you'd have to wait for any
14 period of time to be able to get your coat off the rack?
15 A Yeah, there was, often was a line.
16 Q Can you give me some idea, your best estimate, as to
17 normally how--how long that line was, how many people
18 would be in it?
19 A Usually there were between five and six people ahead of me
20 and it would take me about two to three minutes to get my
21 stuff.
22 Q When--when you say get your stuff, does--is that the--the
23 white coat or is that the white coat and the other stuff,
24 the hairnet and the gloves and the earplugs?
25 A Only white coat.
[page 9]
1 Q And then once you got your white coat and went over to the
2 other room to get your hairnet, gloves, and earplugs, was
3 there usually a line over there, and if so, how many
4 people and how long did that usually take?
5 A About between five and six people and between two to three
6 minutes.
7 Q And after you picked up your stuff from that room, what
8 would you generally--where would you go and what would you
9 do at that point?
10 A Then I would go to check in and get into the--on the line.
11 Q So you would usually go from that room to whatever

time
12 clock you were going to swipe your card?
13 A I will walk to the--to the checker that is--that stands
14 for my line. I will check in and then just go to the
15 line.
16 Q And the time clock, did you--did you--did you rotate
17 amongst the lines, the production lines?
18 A I will switch lines.
19 Q And so did you use--did you swipe on different time
clocks
20 depending upon what line you were on that particular
day?
21 A Yes. If I would go to a different line, I would go to a
22 different check-in.
23 Q Now was there--was there normally a line waiting to-
24 whatever time clock you would--you would check in on
each
25 --on any particular day, was there normally a line waiting
[page 10]
1 at hat time clock, of people waiting to swipe in?
2 A Yes.
3 Q And once again, about normally, anyway, how many
people
4 would be in that line and how long would it take you from
5 the time you got to that line till you were able to
6 finally swipe your card?
7 A It varies. Sometimes you can have five, sometimes
seven,
8 sometimes fifteen, and usually it takes a couple of
9 minutes.
10 Q Now can you--from the time that you would usually
actually
11 arrive at the--I'm going to start over. Which entrance
12 did you usually come in? Did you--did you usually come
in
13 the entrance by the cafeteria?
14 A Yes, I will come to that entrance next to cafeteria, but I

15 had always to go into the cafeteria to leave a lunch
16 before I then go to get ready.
17 Q And then once you--once you had picked up everything you
18 needed to pick up to go upstairs, which stairway did you
19 normally use or--or did it make any difference, or would
20 you use a different one, just sort of random?
21 MR. STEVENS: Do you understand? There's two major
22 stairways. I'm just trying to find out which one she normally
23 used or whether it didn't make any difference.
24 A Depending on which line I'm going. That is to say I will
25 take the stairs which are closer to the line.
[page 11]
1 Q Okay. From the time--can you estimate, as best you can,
2 from the time you would actually enter the plant, at the
3 entrance that you usually came in, until you swiped your
4 card to punch in in the morning, can you give us your best
5 estimate of normally how long it took you, from the time
6 you came into the entrance till the time you swiped your
7 card?
8 A Up to fifteen minutes.
9 Q And out of that time, I'm going to ask you, if you can,
10 the best way, can you estimate for me out of that normal
11 fifteen minutes, to break that down, how much of that time
12 would you say you spent walking, number one; two, waiting
13 in line to either pick some--to either pick up your
14 clothes or swipe in; and three, actually putting on your
15 hairnet and your coat and your gloves and your earplugs?
16 MR. STEVENS: Do you understand? Out of those--
17 THE TRANSLATOR: Three, right? Walking, waiting,--
18 MR. STEVENS: Walking, waiting, and--
19 THE TRANSLATOR: --and--and putting clothes---
20 MR. STEVENS: --and putting clothes on.

21 Q I--I know this is tough and it's--and--and it's impossible
22 to get it exac', but if you feel able to give me your best
23 estimate, can you break it down amongst those activities?
24 A There was--so there was never the same time, depending how
25 many people stand ahead of me. Approximately five minutes
[page 12]
1 for each sequence.
2 Q At the end of the shift, did you ever--during the time
3 that you were working at Barber Foods anyway, at the end
4 of the shift were the--did you take any of these items off
5 before you punched out? What I'm referring to is the
6 earplugs, the gloves, the hairnet, and the coat. At the
7 end of the shift, did you take any of them off before you
8 punched out?
9 A No.
10 Q Now from--can you estimate for me, from the time you
11 swiped your thing--you swiped your card to punch out until
12 you actually left the plant, you know, go out the exit and
13 leave the plant, how much time do you think that took you?
14 A About ten to twelve minutes.
15 Q Am I correct that you could usually--it usually took you
16 less time to swipe and leave the plant than it took you to
17 enter the plant and swipe in?
18 MR. STEVENS: Do you understand what I'm saying?
19 THE TRANSLATOR: Yes.
20 A I think it is.
21 Q To what do you attribute that?
22 A I think because usually there's no line.
23 Q Now I know that some of these next questions may sound
24 very silly, but I'm going to ask them anyway. Okay? How
25 long have--if you can give me an estimate, how long, do

[page 13]
1 you think, did it--did it normally take you to take off
2 your earplugs?
3 THE TRANSLATOR: What?
4 Q How long did it normally take you to take off--to remove
5 your earplugs?
6 A About two seconds.
7 Q And how long do you think it usually took you--and I
8 under--I told you they were going to sound silly but I was
9 going to ask them anyway. How long do you think it
10 usually took you to remove your hairnet?
11 A Two, three seconds.
12 Q Did you--did you usually wear both the white cotton
gloves
13 and the blue rubber gloves?
14 A Yes.
15 Q Okay. How long, would you estimate the best you can,
it
16 actually took you to remove the--both sets of gloves?
17 A It took me several seconds to take it off, but then it
18 took a time to sort them out.
19 Q Explain to me when you say "sort them out" because
I'm
20 not--I'm not sure I understand what you mean by that.
21 A Blue gloves you throw into garbage, and the white one
you
22 will have to put in a place which they will be taken to be
23 washed.
24 Q Okay. So actually removing the gloves would once
again
25 just take a--a few seconds. Right?
[page 14]
1 A Several seconds.
2 Q But then it would take a little more time to find, since
3 one was put into a laundry bin and one into a trash bin,
4 it would take a little more time to make sure you got the
5 right bin. Right?

6 A Yes, it takes a time, and perhaps a minute.
7 Q And how long do you think it--estimate it--it actually
8 takes you--took you to take your--your white coat off, the
9 lab coat?
10 A A minute. Because there are buttons and it takes time.
11 Q Now after you--after you swiped out and you leave the
12 production floor, did you start taking those items off?
13 In other words your hairnet, your gloves, your earplugs
14 and your coat?
15 A When I get in the hail, then I will start just taking
16 earplugs, then walk to the place where I take gloves.
17 Q Where is the hole?
18 MR. STEVENS: Oh, I'm sorry. I--that might have
19 been--are you saying "hall"?
20 THE TRANSLATOR: Hall. Yeah.
21 MR. STEVENS: I'm sorry. I'm sorry.
22 THE TRANSLATOR: Hall.
23 MR. STEVENS: Yeah.
24 Q So where were the--where were the trash bins and
laundry
25 bins located where you would dispose of your hairnet,
[page 15]
1 gloves, earplugs, arid coat?
2 A They will be in the--in the various locations in the
3 halls.
4 Q Now when--when you were removing--and--and I want
to make
5 sure I get it correct. Most days what you wore to the
6 production floor would be a coat, the--I mean the white
7 coat, the hairnet, both sets of gloves, and the earplugs.
8 After you swipe out, when you're removing those, did you
9 generally start taking those off while you're walking down
10 the stairways and down the hail towards the--the bins?
11 A I will usually start doing that.
12 Q And so usually by the time you got to the trash bin
where
13 you can throw, for example, either the rubber--rubber

14 gloves and the hairnet and the earplugs away, they were
15 already off. Is that right?
16 A Depending. I--sometimes I have one set of gloves taken
17 off before I come there and then I stand and take the
18 other gloves off and then I dispose of them. But usually
19 I have my earplugs taken out before I come there.
20 Q Usually you would have at least your earplugs and your
21 hairnet taken off before you got to the first trash bin,
22 is that right?
23 A It depends. You know, sometimes I will come with
gloves
24 taken off and I will--I will take my net after I take the
25 gloves off, and sometimes I will take the gloves off only
[page 16]
1 when I come to this--places where to dispose and then take
2 the net. So it depends on the walking and--and my body
3 movement.
4 Q And what you would--Am I correct that--that what you
left
5 in your locker every day was the--was the warm jacket that
6 you would wear for warmth?
7 A Yes, I——I always check there.
8 Q So and--and—if you can, can you tell me if—if you
9 didn't—I think you previously told me that it usually
10 took you about ten to twelve minutes from the time you
11 swiped out at the end of your shift until you left the--
12 actually exited the plant. If you didn't have to go to
13 your locker, okay? If you didn't have to go leave
14 anything in your locker, if you were just swiping out and
15 taking your hairnet, gloves, and earplugs off and throwing
16 your coat--and throwing your white coat in the laundry
and
17 then getting out of the plant, how long do you think it
18 would take you to do that?
19 A bout five, six minutes. That--that includes a waiting
20 time.
21 Q Waiting time on the way out?

22 A Yeah.
23 Q Can--can you—go ahead.
24 A Usually the place where we take white coats off, there's
a
25 line, and there's a place where you hand them off.

Exhibit 9

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, et al,	*
	*
Plaintiffs,	*
	*
V.	*
	*
BARBER FOODS,	*
	*
Defendant.	*

DEPOSITION of TADEUSZ OLSZYNSKI, was held at the law offices of Kelly, Remmel & Zimmerman, 53 Exchange Street, Portland, Maine, on October 23, 2001, before Carla Culver, a Notary Public in and for the State of Maine.

APPEARANCES:

For the Plaintiffs:	Charles Dixon, Esq.
	Lori B. Kisch, Esq.
For the Defendant:	Graydon G. Stevens, Esq.

[page 5]

1 A I forgot to -- also blue belt, I mean a black belt, back
2 support. I have to use it.
3 Q You wear the coat every day?
4 A Yeah, you have to --
5 Q That's required?
6 A -- required now in the production floor, coat.
7 Q And you wear a hairnet every day, and that's required?
8 A Yes, correct.
9 Q Do you wear both the rubber gloves and the cotton glove--
10 cotton liners?

11 A Well it depends, depends what I'm doing. If I -- let's
12 say I'm operator and I don't have to like help, for
13 example help workers on the machine. But if I decide to
14 help, I have to put rubber gloves cause I can touch the
15 chicken with two gloves on, with hands we're not
supposed
16 to do it, so we have to put rubber gloves and also
17 sleeves, plastic sleeves.
18 So I take it if you're just working the machine, do you
19 typically not wear gloves?
20 A Usually I have palletizing gloves, no rubber gloves,
21 cotton gloves.
22 And then if you have --
23 A Cause I have to, like I say, I have a ring, diamonds, I
24 have to -- (Indiscernible) not stones uncovered.
25 And then if you, for example, leave your machine to go
[page 9]
1 palletizing gloves.
2 Q And do you pick those up and take them back to the cage
3 every day, those palletizing gloves?
4 A No, I don't have to return to cage, I just put them
5 through the dirty clothes. We have bags for dirty gloves
6 and bins for dirty clothes. They like -- the washroom,
7 and they're used again.
8 Q But I guess what I'm trying to get at is where you
usually
9 get your palletizing gloves each day when you come to
10 work?
11 A From the cage.
12 Q You get a new pair every day?
13 A Yeah.
14 Q Now your steel-toed boots, where do you get those
from?
15 A I keep them in my locker, my locker.
16 And your earplugs?
17 A Earplugs, I get that from the cage.
18 Do you get those every day?

19 A Yes.
20 And how about your safety glasses; where do you get those?
21 A I have a safety gl-- I keep in my locker.
22 And your bump hat?
23 A Keep in locker.
24 And your back belt?
25 A Keep in locker.
[page 10]
1 Q Now have you had a locker for the last three -- since
2 December 1997?
3 A Yes, I had locker.
4 Q And what do you generally keep in your locker?
5 A Hat, boots, belt, black belt, and my tools.
6 Q And what tools do you keep in your locker?
7 A Like adjustable wrench, Allen wrenches, lock-out and tag-
8 out devices, which I require carry all the time on
9 production floor, scissors, --
10 Q I'm sorry?
11 A Scissors, pair of scissors.
12 Q How do you usually get to work in the morning? Or in the
13 afternoon, I'm sorry, you're second shift.
14 A Can you repeat it?
15 How do you usually get to work in the afternoon?
16 A With a car.
17 You drive a car?
18 A Yeah.
19 And where do you usually park?
20 A In the parking next to the cafeteria somewhere. I usually.
21 park -- I park where I find space quickly.
22 When do you typically arrive at work?
23 A I typically like 3:15.
24 And what entrance do you usually use when you come into

25 the plant?
[page 17]
1 A Yeah, um—hmm.
2 Q Now I take it when you come up, you generally come up the
3 spiral I staircase; is that right?
4 A Yes, yes.
5 Q And when you get on the production floor, I mean when you
6 come through the door, what do you typically do?
7 A We're coming through the door, I have to dip my hands in
8 the dip station.
9 Q That's the normal rou-- now there's dip stations at this
10 door, right?
11 A Yes.
12 Q How many are there?
13 A How many? I just see one over there, and the other one is
14 on the production floor, but you have to dip after you're
15 entering, and they check sometimes.
16 Q And then what do you do next?
17 A Then I go to the pack-out 1, which is here, and I punch
18 in.
19 So you punch in -- you generally punch in over here at
20 pack-out 1?
21 A Yes, pack-out 1.
22 Now you generally come in around 3:15 in the afternoon,
23 right?
24 A Yes.
25 How long does it usually take you to get your coat off the
[page 18]
1 rack?
2 A A few minutes. Depends if we have a coat, depends how
3 many people stand. I -- a few minutes, two or three
4 minutes. Sometimes less, sometimes longer. I estimate
5 two or three minutes.

6 Q So it actually takes you two or three minutes to grab your
7 coat off a rack, to actually find a coat and grab it off a
8 rack?
9 A Yeah.
10 Q How long is the line usually there when you come in at
11 3:15?
12 A Ten people.
13 Q There's actually ten -- there's a line, you actually have
14 to wait for one person at a time to grab their coats off
15 the rack?
16 A Yeah, I have to wait.
17 Is that typical that you have to wait to actually grab
18 your coat off the rack?
19 A Yeah, usually a few people there.
20 I'm sorry, I didn't understand that.
21 A Usually some people stand there and pick out a coat.
You
22 have to wait, like two person, stand next to the rack and
23 they finding their coats, so I have to wait. Some people
24 look annoyed and they go over your shoulder and grab the
25 coats and push you and -- but I wait.
[page 19]
1 Q Almost every day?
2 A Yeah.
3 Q Once you grab your coat, how long does it actually --
how
4 long does it normally take you to get whatever you get out
5 of the cage--your earplugs and whatever else you get out
6 of the cage?
7 A Usually there's a line to the cage, so I have to stand
8 another few minutes in line to get my stuff, to get
9 earplugs and hairnet and gloves.
10 Q How long is the typical line at the cage time wise, that
11 you actually have to wait in line?
12 A Depends. Sometimes it's few people, sometimes twenty
13 people, sometimes no people.
14 Q Give me -- is there a typical wait or does it always

vary?
A Typical wait, there's always few people, like ten people standing in line.
So typically -- your best estimate is that it's typically approximately ten people waiting at the cage to get their stuff, right?
A Yes.
And is there a typical time that it takes them to get it so from when you get there, like the tenth or eleventh person, to actually get up at the window, is there a typical length of time that that takes?
A A few minutes.
[page 20]
Q When you say a few minutes, I mean two, five, six, seven,
is there -- can you give me your best estimate?
A I never figure out how long. I never stop with a watch and look. We can do it later. I'd say it take me fifteen to twenty minutes to get ready, to get on production floor since I arrive.
Q But I'm trying to break this down and --
A Yeah, but like I said, I never stand with a watch and check how many minutes.
Q Well let me ask you this: When you actually -- when you
move up the line and arrive at the window, okay, and basically hold your hand out and get your earplugs and your hairnet -- and what else do you get out of the cage typically on a typical day?
A Gloves.
Q Okay, your earplugs, your hairnet and your gloves. From the moment that you actually -- your face arrives there at
the cage and either Helen or Sharon or whoever is in there hands that to you, how long does that take?
A Since I stay in the cage?
Yeah, from the time that you move up the line so that

you're next in line; in other words, you actually are
right there at the window, --
A Five minutes, five minutes.
No, no, I'm not asking you how long it takes you to stand
[page 21]
in line. What I'm asking you is --
A How long it take to pass me this --
Q That's right. For example -- let me do it this way cause
this might be easier. If there was no line at all and you
just walked right up to the cage, put your hand out, how
long does it take you, do you think, for them to give you
the stuff that you need out of the cage?
A Less than one minute.
Well I mean it would literally take like five seconds,
wouldn't it?
A Well, if I -- I always ask for palletizing gloves, and
palletizing gloves, the person's supposed to go back, say
10 feet back, wherever they are, and bring you them.
Other stuff like hairnet and gloves, she just pick from
the bins and put like that. For gloves you got to go
back, so it's not like you can do it in five seconds.
Do you think it takes a minute for her to go --
A Less than one minute.
Q So am I correct that the worst-case scenario, if there's
no line, the longest it takes you to get your materials
from the cage, from the time you arrive at the window
until they're actually in your hand, is a minute?
A Yeah, no people.
And if it wasn't for the gloves, I mean people -- the
typical line associate, do you generally stand in line
[page 25]
A Well I never measure. We can do it later, if you want.
Q Well I know, but what I'm wondering is if you have an
estimate of the amount of time it actually takes you once
you open your locker to just grab your back belt and put
it on and buckle it?
A Well, let's say three minutes.

7 Q You think it takes you three minutes typically to actually
8 put your belt on?
9 A Yeah, I'd say three minutes.
10 Q What do you put on next?
11 A Then I put my boots on.
12 Q How long does it take you to put your boots on?
13 A Another three minutes. I got to take off my sneakers, got
14 to sit down, and then I put my boots, then I put my vest.
15 Q Okay, wait a second. So your boots you put on --
16 generally put on next, and you say that generally takes
17 you about three minutes, right?
18 A (Nods head affirmatively.)
19 And what do you put on next?
20 A My vest.
21 And where do you get the vest?
22 A It's my private vest.
23 That's your private vest that you - -
24 A Yes, because I cold on floor. Everyone on this floor has
25 some.
[page 26]
1 Q Is it a button-up vest or a zip-up vest?
2 A A zipper vest.
3 Q And how long does it take you to put the vest on?
4 A One minute.
5 Q Does that have sleeves on it or is it sleeveless?
6 A No, sleeveless.
7 Q What do you do next?
8 A Then I put my coat on.
9 Q How long does it take you to put your coat on?
10 A Another minute.
11 Q How many buttons does it have on it?
12 A Five or six.
13 Q What do you do next?
14 A Then I put hairnet.
15 Q How long does it take to put your hairnet on?
16 A Ten seconds.

17 What do you do next?
18 A Then I put my hat, plastic hat.
19 - How long does it take you to put that on?
20 A Say another twenty seconds.
21 It takes you twenty seconds to put a hat on typically?
22 A Yeah.
23 And what do you put on next?
24 A Then I grab up my tools, put my tools to the pockets.
25 What tools do you generally grab?
[page 27]
1 A Adjustable wrench, Allen wrenches, scissors, also pen, and
2 lockout, tag-out stuff.
3 Q And where do you keep those during the day?
4 A In the pockets.
5 Q The outside pockets of the coat?
6 A Yeah, in my coat.
7 Q How long does it •take you to grab your tools and put them
8 into your coat pocket?
9 A Say one minute.
10 Q After you do that, what do you do?
11 A Then go to production floor.
12 Q When do you hang your earplugs around your neck?
13 A Yeah, before entering production floor I have to put my
14 plug-- earplugs in.
15 How long does it - - I'm sorry, go ahead. How long does it
16 take you to put your earplugs on, actually get them
17 around, you know, and get them around your neck and put
18 them on?
19 A I have to first prepare them - - I have to squeeze them - - I'd
20 say one minute.
21 Do you use new earplugs every day?
22 A Yeah.
23 And how long does it take you to get your safety glasses

24 out of your locker and put them around your neck?
25 A Twenty seconds.
[page 29]
1 A Yeah, we have breaks.
2 Q No, I'm talking about -- I'm not talking about breaks.
3 I'm talking about the beginning of the shift, from the
4 time you walk in to come to work until you get up on the.
5 production floor and punch in, do you follow this routine
6 all the time or are there occasions where you go to the
7 cafeteria and have a cup of coffee or --
8 A Yeah, I forgot to tell about the first thing I enter the
9 company, I go to cafeteria to put my lunch bag into the
10 frig. That's the first thing I do.
11 Q And after you've -- I guess what I'm asking though is --
12 A Yeah, after that I go to get my coat.
13 Q And after you get your coat and then go to the cage and
go
14 to your locker, --
15 A Yeah.
16 -- are there occasions where instead of proceeding
17 upstairs to dip and punch in, you go to the cafeteria or
18 somewhere else just to socialize or have something to eat
19 or something to drink?
20 A No, I don't have a time for that. No time like a half
21 hour before the shift and sitting for nothing in the
22 cafeteria.
23 Let me ask you, how long do you think it takes you to --
24 how long does it take you to walk from the time you enter
25 the plant, the plant entrance that you typically use,
[page 30]
1 until you get to the coat rack?
2 A One minute.
3 Q How long does it typically take you to walk from the
cage,
4 once you've picked up your materials at the cage, to your
5 locker?
6 A Usually I guess two minutes. Depends how much people

on
7 the hall. Sometimes we have so many people you have to
8 sneak between people. Sometimes -- but usually I would
9 say two minutes to get to locker.
10 Q And once you've actually got your stuff on, everything
11 that you're going to put on so that you're ready to leave
12 the locker room and go upstairs, how long does it actually
13 take you to walk upstairs and to the dipping
14 station?
15 A That also depends how many people on the stairs, but I
16 would say two minutes. Usually people upstairs, before
17 people entering the door, people put your glasses on and
18 it's like they block the door for people who don't have to
19 put glasses on. So sometimes you have to wait or just
20 sneak between people. I would say two minutes.
21 From the time you actually leave the locker room until
you
22 actually are able to dip your hands in that dipping
23 station?
24 A Yes.
25 And is that because there is typically a wait at the
[page 41]
1 A Nothing.
2 Q Let's not talk about after or before punch out. What do
3 you have to take back to the cage on any typical day?
4 A The stuff I signed for the machines.
5 Q And when do you usually take that back?
6 A Before I punch out.
7 Q At the end of the shift --
8 A Yes.
9 Q -- before you punch out, you take your codes and your
10 metal --
11 A No, no, no, you mean my codes?
12 Q Yeah, the stuff that you got out of the cage.
13 MS. KISCH: Codes, codes, not coats.
14 Q Codes.
15 A Cook codes?

16 Q That's right, yeah, cook codes.
17 A Okay.
18 So that type of -- anything that you got out of the cage
19 and had to return to the cage, I take it you returned to
20 the cage before you --
21 A After production done.
22 After production is done, but before you punch out for the
23 day?
24 A Yes.
25 And then you come back up and punch out?
[page 42]
1 A Yes, after that, yeah, punch out.
2 Q And in your locker room, I take it you've generally
3 already thrown away your earplugs and your hairnet, right?
4. A Yes.
5 Q And you generally have taken your coat and your gloves
off
6 and thrown them in the laundry bin, right?
7 A Yes.
8 Q So then what do you need to take off, what else do you
9 need to take off in the locker room and actually store in
10 your locker before you can get out of there and go home?
11 A My hat, plastic hat, my vest, my black belt, and my
tools,
12 and lockout tag things, my boots.
13 Q Just if you can, try to separate the amount of time it
14 actually takes to take that stuff off and store it in your
15 locker, how long do you think that takes you? I'm not
16 talking about walking time from pack-out 1 all the way
17 down to the locker room, and walking time from the
locker
18 room out of the plant. I'm talking about you've already
19 gotten rid of your hairnet and earplugs on a normal day,
20 you've already gotten rid of your coat and your gloves
21 while you're walking from the floor down to the locker
22 room on a normal day. Now you're left with whatever you
23 have to store in your locker. How long does it actually

24 take you to take the rest of that stuff off and store it
25 in the locker?
[page 43]
1 A At least five minutes.
2 Q And then how long does it generally take you to go from
3 the locker and actually walk out of the plant, before you
4 actually leave the door?
5 A From the locker? I go first to cafeteria to get my stuff
6 from frig, then I go out. Two minutes.
7 Q Now you said something earlier, and I won't get it exact,
8 about your supervisor telling you to prepare codes or
9 something for the next day so it wouldn't take you so
10 long?
11 A Yeah.
12 Q Do you understand what I'm talking about?
13 A Yeah, we complain many times in the past about long
lines,
14 and we sometimes wouldn't like the work because of long
15 lines. It was long time ago.
16 Q When you say a long time ago, more than three years
ago?
17 A More. And long lines to get the stuff, like the coats,
18 gloves, and we were late, and sometimes production start
19 late. Because of that we complained to supervisor, and he
20 said the best way to avoid this is to prepare after the
21 work, after job done after your shift, take the time,
22 prepare your coats, your gloves, your hairnet. Put to
23 your locker and you don't have any problem.
24 And who said this?
25 A It was at the time Alan Gilman and Tyrone Ives.
[page 47]
1 you have not had your thirty-minute lunch break?
2 A I don't recall like a short breaks or short lunchtime.
3 Q Now what do you, you yourself, what do you generally
do
4 during your lunch break?
5 A On the lunch break?

6 Q Yeah. Just typical.
7 A Lunch break I go to cafeteria usually and eat my lunch and
8 go to bathroom. Usually after lunch go outside, smoke, or
9 just go outside to take breath.
10 Q I take it you're allowed to -- you could do whatever you
11 want to do --
12 A Yes, --
13 Q -- on your lunch break?
14 A -- you can go home, you can go see a friend.
15 Q As long as you take your coat off before you leave the
16 plant, you can do anything you want?
17 A Correct.
18 Now there are some--and I'll never be able to get exactly
19 what it said in the Complaint--but there were some
20 allegations in the Complaint that was filed in this case
21 that people were required to visit the medical office
22 during their lunch break, during their unpaid lunch break.
23 Did that ever happen to you?
24 A I never remember if I was sent on lunch break, but I
25 remember I was sent to the doctor before work, like on
[page 48]
1 next day, cause there's a doctor or something once or
2 twice a week. So a nurse asked me to come over the next
3 day at 3 o'clock before work's time.
4 Q How many times did that happen?
5 A I think once, I guess.
6 Q And do you recall when that was?
7 A I guess it was in 1997, 1998.
8 Q Either in 1997 or 1998?
9 A Yeah, I recall like three times I was in the nurse office
10 or hospital in '97, '98, '99. I was few times, but I --
11 Q What I'm trying to figure out is can you give me your best
12 estimate of how many times you actually visited, were told
13 to visit the medical office either during your unpaid

14 lunch break or before or after your shift?
15 A Okay, once I visit before my shift, and twice I was sent
16 to the hospital, Brighton, or Mercy, Mercy, no, no Mercy.
17 Q Mercy?
18 A No, on Brighton Avenue.
19 Q Oh, on Brighton Avenue, okay, Brighton Medical Center.
20 A Brighton Medical Center, yeah. I was sent there and I
21 spent like three or four hours there waiting for doctor
22 and for treatment, then took x-rays. So I spent few hours
23 over there and I didn't have lunch.
24 Q Were there any other times?
25 A I don't know, I don't recall.
[page 49]
1 Q Now the time before the shift, what type of injury, was
2 that a work-related injury?
3 A Yeah, it was a back pain.
4 Q I'm sorry, what?
5 A Lower back pain.
6 Q And do you recall -- can you give me your best estimate of
7 when that was?
8 A '97.
9 Q December of 1997 or before December 1997?
10 A I don't recall. They must have keep a record on.
11 Q Do you remember when the next visit was?
12 A No, I don't recall but I have like a restriction card and
13 I have it somewhere in my locker.
14 Q And how long did you visit the nurse on that occasion?
15 A For how long? It was half-hour.
16 Do you know whether you got paid for that?
17 A No, it was before work so I didn't punch in yet.
18 And how did that appointment come to be?
19 A Pardon me?
20 Do you know how it was that that appointment was made for
21 that particular time?

22 A Well the last, last day before when I went to the nurse
23 with back pain and I -- and she said come over to me at 3
24 o'clock and doctor gonna' be here, and she check, she
make
25 appointment.

Exhibit 10

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, et al.,	)
Plaintiffs,	) Docket No.
	) CV-00-371-P-C
vs.	)
	)
BARBER FOODS, INC.,	)
d/b/a BARBER FOODS,	)
Defendant.	)

30 (B) (6) DEPOSITION of BARBER FOODS, INC. (Peter H. Bickford) and PETER H. BICKFORD, individually, taken pursuant to notice dated July 12, 2001, at the Law Offices of William C. Nugent, 75 Pearl Street, Portland, Maine, on August 14, 2001, commencing at 1:45 P.M., before Lisa M. Stiles, Registered Professional Reporter, a Notary Public in and for the State of Maine.

[Page 44]

1 memorialized in Exhibit 10 in terms of the transcript, no
2 member of the Barber family has ever addressed the entire
3 employee complement at one time other than in those-with
4 respect to the twice annual company meetings?
5 A. I don't recall any other particular instances, but --
6 Q. Okay. All right.
7 MR. STEVENS: If you're going to switch gears,
8 can we take a bathroom break?
9 (A SHORT BREAK WAS TAKEN.)
10 Q. All right. In the exhibits that we have already
11 marked, Exhibits 3 and 4, Mr. Bickford, the employee
12 handbook and the associate handbook, can you describe the
13 relationship, if any, between those two documents?

A. Yes, Exhibit 4 is a 1996 update of the 1993 version, Exhibit 3.
Q. Okay. At some point in that time frame, you started calling employees associates?
A. Yeah, it may have been as early as '93, but we didn't get it on the handbook cover.
Q. Okay. One portion which is changed from Exhibit 3 to Exhibit 4 is -- well, first of all, in regard to salary, the overtime computation has some different types of figures that might be updated and more realistic. Is that the reason why you got those figures different?
A. What page?

Exhibit 11

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, et al.,	)
Plaintiffs,	) Docket No.
	) CV-00-371-P--C
vs.	)
BARBER FOODS, INC.,	)
d/b/a BARBER FOODS,	)
Defendant.	)

30(b) (6) DEPOSITION of BARBER FOODS, INC. (Thomas A. Page), taken pursuant to notice dated July 12, 2001, at the Law Offices of William C. Nugent, 75 Pearl Street, Portland, Maine, on August 13, 2001, commencing at 10:15 A.M., before Lisa M. Stiles, Registered Professional Reporter, a Notary Public in and for the State of Maine

[page 11]

1 Q. And how is that translated into their -- computation
2 of their paycheck?
3 A. They punch in initially, then they punch
several other
4 times during the day that have no influence on their pay,
5 they just allow us to analyze where we are utilizing the
6 labor. The two most important punches are the in- punch,
7 which is the first, and the out-punch, which is the last.
8 Q. All right. What kind of-- can you describe the punch
9 card system, does the card -- does it register on the card,
10 is there a time printed on the card or does it go
11 automatically in a computer system or how does it work?
12 A. There are time clocks in most every area and you take
13 your time card -- it's very much like a credit card - - and
14 you just slide it through the machine and it will register
15 your punch. Just swipe it.
16 Q. It's a swipe card?

17 A. Yes.
18 Q. So the time of the swipe, is it registered on the card
19 or is it registered in the machine?
20 A. In the computer.
21 Q. In the computer?
22 A. Yes.
23 Q. And to whom does that information go, I mean who
24 downloads that information?
25 A. I assume the accounting department.
[page 12]
1 Q. Okay. All right. And what's the nature -- can you
2 describe the appearance of the device into which the card
3 is swiped?
4 A. It's a box, I would say --just guessing -- 18 inches
5 long, 8 or 10 inches high, and it has a slot in it and you
6 just swipe your card.
7 Q. Uh-huh. The card itself, does it -- basically it only
8 contains the identity of the employee who swipes it?
9 A. Yes.
10 Q. It's telling the computer that this employee swiped
11 his card and the computer knows what time it is?
12 A. Yes.
13 Q. Okay. All right. Is there any -- and literally, the
14 time that the person swipes the card on the punch in, is
15 that the time they start getting paid?
16 A. Yes.
17 Q. And when they -- how do they -- you mentioned the
most
18 important ones are the punch-in and the punch- out?
19 MR. STEVENS: You have to answer
verbally, if
20 you're going to answer.
21 A. Yes.
22 Q. Then the -- and then there are some other swipes in
23 the middle of the day which are not as important, right?
24 A. Yes, they're just simply for us to analyze where the
25 labor is being used.

[page 17]
1 A. Unless I'm misreading the blueprint, for example, the
2 54 office area which has conference room, typically, the
3 associates will go to these clocks when they -- when they
4 come in. For example, there are three lines. There's a
5 clock at each end of each line. You have a specialty end
6 of the line which forms the product, it goes to the
7 freezer, and then you have a pack-out area, and
they both
8 have clocks.
9 Q. Okay.
10 A. There were some office areas not included.
They also
11 have clocks. I'm not sure where the PD clocks are, clocks
12 in other departments, clocks in the maintenance
department,
13 for example. I'm primarily concerned with the -- where
my
14 associates would be punching in.
15 Q. Okay. Now the witness has made a number
of time clock
16 markings on chart -- diagram number 4. Is diagram
number
17 4, is this the production floor?
18 A. Yes, these are production areas. And I may have
19 omitted a clock or two, but these are the typical clocks
20 that I'm familiar with.
21 Q. You didn't make any markings on number 3?
22 A. I have not yet, but I'm going to.
23 Q. Okay. We will leave that there. If you remember any
24 others, go ahead and make them.
25 A. If I had a list of the time clocks, I could -- they're
[page 21]
1 they're going to be wearing or at least carrying the
2 glasses and the ear plugs?
3 A. That's a personal choice. Some people would have
4 their hair nets on, some people wouldn't. Some people

might hold their coat. Again, we are more concerned with when they reach the production floor.
Q. Let's talk about that as well. On diagram four, all of the time clocks that you have notated on the diagram with the designation TIC with a circle around it, each of those -- I think we did that off the record, so I should make it clear -- each of those is a time clock?
A. Yes, you can see that in some cases, there's a number that may suggest that there is more than one clock. And again, I'm sure I omitted a few. As you can see, there is quite a few of them.
Q. These are all on the interior of the production floor itself; is that right?
A. Yes.
Q. And how do the employees get to the production floor, are there certain entrances that they have to come through?
A. There are two stairways leading to the production areas. One would be on the easterly side and one on the westerly side.
Q. Okay. Can you point those out to us?
A. For example, this one right here would be the western
[page 39]
A. It's the area after the freezer, the area after the freezing where the product comes out and it's frozen and it's packed.
Q. Are there employees that work in the freezer area?
A. Not in the spiral freezers because they're very, very cold. We have shipping associates that work in a central freezer.
Q. Okay. Do they wear sleeves?
A. I don't believe they do.
Q. Okay. Now the last item, back belt, and it says in parentheses, if a lugger. What's a back belt?
A. A lugger is somebody that's been certified to lift up to40pounds.
Q. Okay. And those persons must wear a back belt?

A. If they are in a job which requires lifting, yes.
Q. Okay. First of all, what's a back belt?
A. A back belt is an elastic -- it's fabric and elastic which, when attached, goes around your midsection to help remind you to keep your back straight when you are lifting.
Q. Okay.
A. It's more of a reminder.
Q. How does it remind you, because they can feel it?
A. Yes, if you try to bend, it will offer resistance.
Q. Okay.
A. And again, we encourage the associates to lift in an

[page 40]

ergonomically responsible way.
Q. All right. Now if a person -- if a person is a lugger -- strike that.
If a person is working in a job which requires them to use the back belt because they're going to have to -- they may lift up to 40 pounds, they would be working in a job in which their job description would indicate that that is a task, right?
A. Can you rephrase that?
Q. Yeah, that was a little bit awkward. I will just represent to you we got from Barber Foods in our document -- response to our document request, we got several inches of job descriptions for all kinds of different jobs at -- for all the jobs, I guess, at Barber Foods. If a person is working in a job which requires them to lift up to 40 pounds such that they would have to wear a back belt, that requirement would be listed in the job description?
A. I'mnot-20
Q. Or do you know?
A. I have not looked at the job descriptions. I'm not sure.

23 Q. Well, typically, who has to -- what jobs require that
24 kind of lifting requirement?
25 A. In the--
[page 79]
1 Q. Okay. Does anybody have to ever wear the steel mesh
2 gloves?
3 A. Yes, yes, that was an oversight on my part,
4 absolutely. Not very many jobs, but some do.
5 Q. Who wears the steel mesh gloves?
6 A. The mesh gloves would be worn by an associate that
7 would be using a knife to open up, say, boxes of cheese or
8 ham.
9 Q. Okay. Are those line workers?
10 A. They would be line workers.
11 Q. Okay. They're in special work stations, their
12 particular work stations, in other words, not all line
13 workers do it?
14 A. No, very few line associates would be using knives,
15 very, very few.
16 Q. For those who do, where do they get their steel mesh
17 gloves?
18 A. The mesh gloves would typically be supplied for them.
19 I believe the housekeepers on the line would supply those
20 as well as the knives.
21 Q. Okay. In other words, they obtain them after they're
22 at the work station?
23 A. Typically, they would be given these at the station.
24 We wouldn't have the associates, typically, go down to
the area.
25 cage and get them. They should already be in the
[page 104]
1 chickens?
2 A. Are you asking whether or not they begin working
3 producing product right at 3:45?
4 Q. What I'm asking is: At 3:45, where is a production
5 worker supposed to be at 3:45?
6 A. 3:45, they're typically in their area or close to that

7 area.
8 MR. FLEMING: I'm going to put in two exhibits.
9 (EXHIBIT NO. 3 EMPLOYEE HANDBOOK, MARKED BY THE
10 REPORTER.)
11 (EXHIBIT NO.4 ASSOCIATE HANDBOOK, MARKED BY THE
12 REPORTER.)
13 Q. I'm going to hand you two documents marked Exhibits 3
14 and 4. Both these documents have been produced to us
15 during this litigation. Mr. Page, first of all, can you
16 identify, first, Exhibit 3, what's Exhibit 3?
17 A. It just says employee handbook.
18 Q. And is it the employee handbook for Barber?
19 A. Let me take a look at it. It certainly looks pretty
20 familiar. I did notice this one said associate -- I mean
21 employee and this one said associate.
22 Q. That's my next question, actually. What's the
23 difference between these two?
24 A. And there is no difference. I'm not really sure when
25 the terminology was changed. Yes, this does look somewhat
[page 105]
1 outdated. We have got Augustus Barber. This one is
2 outdated.
3 Q. Are you talking about Exhibit 3?
4 A. Exhibit 3. It also has a 1993 date stamp on it.
5 Q. You saw the name of Augustus Barber on the
6 organizational chart?
7 A. He might still very well be there. His son has
8 assumed control of the company. He is the president,
9 Stephen Barber.
10 Q. We won't tell him that you didn't know.
11 A. Please don't. No, he is, in fact, the president. And
12 this one is certainly more up to date.
13 Q. You are referring to Exhibit 4?

A. Exhibit 4,yes.
Q. All right. Now let's look at Exhibit 4 then, use that one. There was a -- actually, I guess I need to use Exhibit 3, the employee handbook. If you would look at page 14, the section called attendance policy and time off. Actually, I don't find the same -- in Exhibit 4, there's -- at page 17, there's a section on attendance policy and time off, but it's somewhat different.
A. You said page 17; is that correct?
Q. Yes.
A. All right.
Q. Was there a change in the attendance and time off

[page 113]

somebody perhaps in a different area or whatnot.
Q. Do you know which is typical, that a person who needs to use the restroom is permitted to use the restroom during the course of the shift or is it more typical that they must wait for -- and go on their lunch break or during a rest break?
A. We certainly suggest they use their lunch break or their -- any type of break.
MR. STEVENS: What is more typical, Tom? If somebody in the middle of a shift says, I need to go, what's typical, do they allow them to go or tell them to wait for a break?
A. My leads -- my expectation is my leads will get them to the bathroom, do what they have to do. I have an open door policy on second shift and any associate can come to my office with a complaint or a suggestion. And I can assure you that if we were, on a daily basis, denying people the use of the bathrooms, I would have a steady line to my office. Are there times when a person might have to wait a little bit, yes.
Q. How do you know-
A. And again -- and again, I can't answer this question

for each and every one of my line leads or crew leads. I'm talking general policy on second shift.
Q. Okay. How do you know, though, that if there was --
[page 117]
from the fact that employees use them in that they're either more sanitary or even if they're more comfortable?
A. Yes, in that respect, I would have to agree that anything we can do to make somebody's stay at Barber Foods more pleasant, it's a benefit to everybody.
Q. Well, employees who are more sanitary or more comfortable, that is something that, in the associates handbook, the company cites as important to the company operations, isn't it?
A. Are you referring to the mission statement?
Q. Several places, actually. The mission statement is one.
A. It makes common sense and it's certainly in line with the company's philosophy.
Q. Okay. Now for those -- all those production employees who have to come to work, go to the cage, get the equipment, go get their lab coats, do all the things they need to do, put them on, put on their hair nets, put on all the equipment they have to put on prior to entering the production floor, come in and be at their work stations in time for the 3:45 P.M. start time, including the exercise and the start time, all right. What's your expectation for how long -- for when an employee should report to work at the front door, the entrance to the building, in order to get through all those steps and be ready to work and not be
[page 118]
late, how long before the 3:45 start time?
A. I think we, basically, told the associates that we would really prefer they not come to work too early. They can come to work 20 or 30 minutes before the shift is to

5 begin.
6 Q. In what context do you tell them that?
7 A. Well, in -- it has to do with parking and associates
8 arriving at Barber Foods. And we found that if they arrive
9 at Barber Foods 20 minutes before their shift, it's
10 perfectly adequate for them to do all the things
they need
11 to do.
12 Q. I'm sorry, 20 minutes, did you say?
13 A I would say 20 minutes would be more than --.
14 Q. The question is what do you tell them.
15 A. Specifically?
16 Q. Yeah.
17 MR. STEVENS: Do you know?
18 MR. FLEMING: I'm asking these questions. He is.
19 getting the point.
20 A. I'm not sure, specifically, what they're told. Again,
21 they work with their trainer. They have contact with their
22 crew lead. And I assume that we would be relatively
23 consistent from line lead to crew lead and so on and so
24 forth, but I can't speak for all of them. Obviously, they
25 want to be up in the production floor in a timely fashion.
[page 119]
1 Q. That's the point. They want to be up there in a
2 timely fashion, so you must -- you indicated you tell them
3 something about how to do that because they have got to
do
4 these other -- these various steps, right, and you teach
5 them that, you train them that, right?
6 A. Right.
7 Q. So it stands to reason you tell them you better get
8 here so many minutes before your start time in order to be
9 ready, don't you do that?
10 A. I'm not sure we specify you have got to be up there at
11 3:45 or whatever.
12 Q. I didn't say, got to be. In the training -- in the
13 course of the training and the orientation that you said

14 goes on for two or three weeks and they're showing them how
15 to put on the equipment, they have got to do it the right
16 way, right, you can't wear your hair net half cocked, you
17 have to have it on right, you have to have the hearing
18 protection, you have to have whatever it is you have to
19 have for your job, and you spend two to three weeks
20 training people in how to get that right?
21 A. Notjust-22
Q. There are other aspects as well?
23 A. That's part of it, certainly.
24 Q. So don't they need to know -- and you do tell them
25 definitely they have to have this on before they come onto

Exhibit 12
BARBER FOODS
ASSOCIATE
HANDBOOK

NOTE: THIS IS NOT TO BE CONSIDERED AS AN EMLOYMENT CONTRACT – ANY EMPYLOYMENT AT BARBER FOODS IS OF AN "AT WILL" NATURE.

The company reserves the right or alter, reduce or eliminate any pay practice, policy benefit without notice.

[page 14] **VI DAYS AND HOURS OF WORK**

HOURS OF WORK OPERATIONS DEPARTMENTS

NORMAL HOURS:

1st Shift - 6:45 A.M. to 3:15 P.M.
2nd Shift- 3:45 P.M. to 12:15A.M.
3rd Shift- 11:45 P.M. to 6:45 AM.

The schedule of breaks is as follows:

1st SHIFT-9:00AM-15 min.; 11:00AM – 30 min.; 1:30 PM-10 min.
2nd SHIFT - 6:00 PM - 15 min.; 8:00 PM- 30 min.; 10:00PM – 10 min.
3rd SHIFT - 3:30 AM-30 min.

All hours of work are variable to some degree depending on the company's need for set up and cleanup. Your supervisor will notify you if a time change is necessary.

ALTERNATE HOURS

There are bound to be some deviations to the "normal" work hours within some departments and in specific jobs: If y are expected to work a different or changing schedule, your supervisor will discuss it and. document it for you.

Accounting Corporate Administration, Customer Accounts Administration, Human Resources, Information Systems, Operation Administration, Product Development, Quality Control, Sales and Marketing Departments may have other basic schedules.

OVERTIME

Overtime is occasionally necessary in our business, and associates are asked to be able to work overtime when the

need arises. Hourly associates are paid overtime at the rate of 1½ times your basic straight time hourly wage. See the section "Overtime" on page 12.

BAD WEATHER CLOSING

To find out whether the plant or offices will be open in bad weather, tune to the radio stations listed on the bulletin board during snow season.

Should Barber Foods not be listed as closed, yet you are sure you will be unable to get to work, call your supervisor as outlined in call-in' procedure. Plant management will decide whether anyone unable to get to work because of the weather (when the plant is open) will be considered absent. PLEASE CONSULT THE ATTENDANCE POLICY IN THE NEXT SECTION.

October 1996
**Handwriting omitted.*

[page 17]

IX ATTENDANCE POLICY AND TIME OFF

Every job at Barber Foods exists because it is vital to the success of the company. Associates performing these jobs are the most important resource at Barber Foods. The level to which associates perform in these jobs determines, in large measure, the success of Barber Foods in achieving its goals and being true to its values (customer satisfaction, respect for individuals, innovation, goal achievement, teamwork, etc.). Attendance is the starting point of performance; therefore, it is weighed heavily in performance considerations. Attendance problems will be dealt with as performance issues through the Discipline Without Punishment program.

> Coaching - will begin when absence patterns occur or at the supervisor's discretion.

Formal Transactions - Guidelines . -

Step 1 - Any 4 absences within the last 13 weeks will result in an Oral Reminder

Step 2 - Additional steps will be initiated based upon. the expectations developed in the Oral Reminder.

Associates are expected to call their supervisor, prior to the beginning of their work schedule, when they will be absent.

EXCUSED ABSENCES

The absences listed below are excused and will not affect your attendance record.

1. - Professional appointments

2. - Funeral leave - excused

3. - Scheduled time off

4. - Disciplinary

5. - No work

PAID TIME OFF

Effective January 1, 1997, all hourly associates accrue Paid Time Off at the rate of 32 hours (4 days) per calendar year (accrual calculations based on paid hours), starring upon employment. Associates can accumulate up to 160 hours of PTO. Any hours over 40 can be sold back to Barber Foods at current rate of pay in units of 8 hours. Benefits of this provision are payable - if eligible - for any normal work day without loss of other benefits, with the following provisions:

• No more than your normal scheduled number of hours of total paid time on one day.
• No paid time off is accrued on overtime hours.
• The associate must request paid time off at the time of reporting in as absent if desired.
• Rules regarding notification are in effect. Absence will be considered an attendance absence if otherwise; valid request for Paid Time Off is not made before the start of the shift.

October 1996

[Page 25] **CORPORATE SAFETY POLICY**

Barber Foods is responsible for providing a safe and healthy work environment for all company associates. We believe that no job is so important that your safety has to be jeopardized in order to accomplish it. In recognition of this philosophy, all managers and supervisors are responsible for:

1. Placing safety on a priority level with production. quality, cost control and good associate relations.
2. Assuring that all work hazards/exposures are controlled and managed.
3. Assuring that all associates are appropriately trained before being assigned to work.
4. Assuring adherence to safe operating procedures/safety rules as a condition of employment.

All associates are responsible for working safely and looking out for the safety of others.

We are convinced that the company will be most successful when all associates are working safely in a safe environment. Therefore, the company will commit resources to assure that everyone's attitude and the working environment contribute

to the achievement of an "injury free" workplace. A safe working environment and success go hand in hand. We are convinced that everyone will receive direct personal benefits by working safely.

"Safety in what we do is as important as anything we do"

October 1996

[Page 28] **DRESS CODE AND UNIFORMS**

All production associates must follow U.S.D.A. and safety rules detailing their manner of dress. Full length pants (jeans/sweats, etc.) are required. Please pay careful attention to these rules for the sake of your own good health and product quality.

All administrative associates must abide by footwear and U.S.D.A. rules while in production areas. Otherwise they may use casual or dress attire and must be clean and neat.

FOOT WEAR

In addition to meeting U.S.D.A requirements all footwear worn in the plant areas of Barber Foods must pass a safety inspection at all times. No high heels are permitted and 75% of the sole must be adequately treaded. Failure of the inspection will mean issuance and acceptance of company furnished footwear or suspension.

U.S.D.A. RULES

1. No food or drink in locker or restrooms.
2. Must keep your person and clothes clean and odor free.
3. Must wear clean lab coats in production areas.

4. Must wear hair nets in production areas.
5. Each entry in production area requires sanitation of hands in iodine bath.
6. No opened toed or open heeled shoes.
7. No nail polish unless you wear gloves.
8. No dangling or multipart jewelry.
9. No rings with stones or filigree unless wearing gloves.
10. No watches.
11. No buttons, badges, pins or stickers to be worn on outer clothing.
12. No aprons and/or lab coats to be worn in restrooms.
13. All associates must wash hands upon leaving restrooms.
14. No spitting on floor, no wiping of nose while on the production line. Step back when coughing (cover mouth), wiping nose with handkerchief or paper towel and then wash hands.
15. Those wearing aprons must remove them before leaving production areas. This applies to production associates only.
16. Those not wearing aprons must remove lab coats before leaving production areas. This applies to production associates only.

ISSUANCE OF PERSONAL EQUIPTMENT

The company issues all necessary personal protective equipment. You will not be charged for this equipment unless you lose it or intentionally damage it. See your supervisor if you need to exchange any equipment.

PERSONAL HYGIENE POLICY

As a company involved in food processing, it is necessary that certain minimum standards of personal hygiene and

behavior be expected from all associates. In addition to any procedures or policies outlined elsewhere, you are expected to take sufficient care of yourself and your clothing so as not to offend your co-workers or be a source of concern or embarrassment to the company.

October 1996

Exhibit 13

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL NO.CV-00-371-P-C
	)	
BARBER FOODS,	)	
	)	
Defendant.	)	

BARBER FOODS' STATEMENT OF MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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[Page 5]
production floor to the cafeteria/break area, so the actual time away from production is 35 minutes, 5 paid and 30 unpaid.[12]

4.3. Associates may leave the premises during their breaks. They must remove their lab coat before leaving the plant.[73]

4.4. Sanitation associates on the third shift are paid from punch-in to punch-out, with no deduction for an unpaid meal break.[74]

5. SANITARY/SAFETY CLOTHING/EQUIPMENT - GENERAL

5.1. All associates are required to have on the following sanitary and/or safety clothing or equipment before entering the production floor: lab coat, hairnet, beardnet (if applicable) and earplugs. Since October 15, 2001, Barber Foods has also required all associates on the production floor to wear safety glasses. Before October 15, only certain positions or tasks required safety glasses.[75]

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[73] Bickford Affidavit, ¶ 14.
[74] Bragg Affidavit, ¶ 7.
[75] Whittier Affidavit, ¶ 2.

5.2. In addition to the lab coat, hairnet/beardnet, earplugs, and safety glasses required by every associate entering the production floor, there are other items of clothing or equipment worn by some [page 6] associates for safety, sanitary, or comfort purposes. Depending upon job classification, assignment, and personal preference, some [Page 6] combination of the following may be worn: vinyl gloves, cotton glove liners, vinyl aprons, sleeve covers, bump hats, back belt, steel-toed boots.[76]

5.3. Lab coats and cotton glove liners are available to the associates in the hallway between the cafeteria and the equipment cage. The lab coats are on hanger racks and the cotton glove liners are in tubs separated by size.[77]

5.4. Hairnets, beardnets, earplugs, vinyl gloves, sleeve covers, and aprons are dispensed from the window of the equipment cage.[78]

5.5 Vinyl gloves, sleeve covers, and aprons are also available from tubs on the production floor. Associates may obtain these items from the window or the tubs, at their option. Most associates obtain sleeve covers and aprons, if they choose to wear them, from the tubs on the production floor.[79]

5.6. Before August 3, 1999, hairnets/beardnets, earplugs, vinyl gloves, sleeve covers, and aprons, along with lab coats and cotton glove liners, were available to associates from racks and tubs in the cafeteria. Since August 3, 1999

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[76] Whittier Affidavit, ¶ 3.
[77] Whittier Affidavit, ¶ 4.
[78] Whittier Affidavit, ¶ 5.
[79] Whittier Affidavit, ¶ 6.

these items, with the exception of the lab coats and glove liners, have been dispensed from the cage.[80] [page 7]

5.7. The cage is open continuously from 5:00 a.m. - 1:00 a.m. It is staffed by one associate, with a second assistant from 5:30 a.m. - 7:30 a.m. and 1:30 p.m. - 4:00 p.m.[81]

5.8. There are male and female locker rooms and all associates are offered the use of a locker. Associates may use their lockers at their option to store reusable clothing or equipment such as safety glasses, bump hat, back belt, safety boots, and for personal belongings or clothing.[82]

6. SANITARY/SAFETY CLOTHING/EQUIPMENT - BY JOB CLASSIFICATION

The required clothing/equipment in each relevant job classification are:

6.1. Rotating Associates[83]

- Lab coat
- Hairnet/beardnet
- Earplugs
- Safety glasses

6.2. Set-up Operators[84]

- Lab coat
- Hairnet

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[80] Whittier Affidavit, ¶ 7.
[81] Whittier Affidavit, ¶ 8.
[82] Whittier Affidavit, ¶ 9.
[83] Smith Affidavit, ¶ 2.
[84] Ive Affidavit, ¶ 2.

- Earplugs
- Safety glasses
- Steel-toed boots
- Bump hat
- Back belt [page 8]
- LOTO (lock out/tag out)

6.3. Meatroom[85]

- Lab coat
- Hairnet/beardnet
- Earplugs
- Safety glasses
- Gloves (vinyl)
- Apron (heavier-weight vinyl)
- Sleeve covers (heavier-weight vinyl)
- Rubber steel-toed boots
- Back belt
- LOTO

6.4. Shipping & Receiving[86]

- Safety glasses
- Steel-toed boots
- Bump hat/hard hat

Lab coat, hairnet/beardnet, and earplugs are required whenever enter the production floor. Freezer-wear required when enter freezer.

6.5. Maintenance[87]

- Safety glasses

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[85] Goodwin Affidavit, ¶ 2.
[86] Scanlin Affidavit, ¶ 2.
[87] Shaw Deposition: 11.3-11.24, 12.19-13.9, 19.14-19.20, 20.1-20.17.

- Steel-toed boots
- LOTO

Lab coat, hairnet/beardnet, and earplugs are required whenever enter the production floor. Specific safety equipment, e.g., welding mask, required depending [Page 9] upon task being performed.

6.6. Sanitation[88]

- Lab coat
- hairnet/beardnet
- Earplugs
- Safety glasses
- Gloves
- Rain pants
- Rubber steel-toed boots
- Bump cap
- Hose nozzle
- LOTO
- Tool clip (with 3 wrenches) (Level 2 associates)

7. SANITARY/SAFETY CLOTHING/EQUIPMENT - POST-SHIFT DISPOSAL

7.1. Lab coats and cotton glove liners are laundered and reused. Laundry bins are located at several locations along the hallway from the production floor exits to the plant exits and associates drop the coats and liners in these bins on their way out of the plant.[89]

7.2. Vinyl gloves, sleeve covers, and aprons are disposable. Trash bins are located on the production floor

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[88] Bragg Affidavit, ¶ 2.
[89] Page Affidavit, ¶ 2.

and along the hallway from the production floor exits to [Page 10] the plant exits. These items may be removed and deposited in the trash bins on the production floor before punching out if the associate chooses.[90]

7.3. Bump hats, back belts, safety glasses, steel toed safety boots, and reusable earplugs are retained by associates and may be stored in their locker, in their vehicle, or taken home, at their option.[91] Most associates issued steel-toed boots wear them home.[92]

8. TIME KEEPING PRACTICES

8.1. Barber Foods utilizes a computerized time-keeping system. Each associate has a swipe card with a bar code. The system downloads clock punches into the payroll software.[93]

8.2. Time clocks are located at the entrances/exits to the production floor and at the various production areas, such as packout 1, specialty 2, meatroom, etc.[94]

8.3. Rotating associates, set-up operators, and meatroom associates generally punch in at a clock in the area where they will be working and punch out on the "out" clocks which are located next to the two primary entrances/exits.[95] Maintenance

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[90] Page Affidavit, ¶ 3.
[91] Page Affidavit, ¶ 4.
[92] Page Affidavit, ¶ 4.
[93] Bickford Affidavit, ¶ 15.
[94] Bickford Affidavit, ¶ 16.
[95] Smith Affidavit, ¶ 3; Ive Affidavit, ¶ 3; Goodwin Affidavit, ¶¶ 3-4; Page Deposition: 99.16-100.5.

Exhibit 14
BARBER FOODS
EMPLOYEE HANDBOOK

NOTE: THIS IS NOT TO BE CONSIDERED AS AN EMPLOYMENT CONTRACT – ANY EMPLOYMENT AT BARBER FOODS IS OF AN "AT WILL" NATURE

The company reserved the right to alter, reduced or eliminate any pay practice policy or benefit without notice.
**Handwriting omitted.*

[page 23] **CORPORATE SAFETY POLICY**

Barber Foods is responsible for the health and welfare of all company employees as they relate to work performed here. We believe that no job is so important that your safety has to be jeopardized in order to accomplish it. In recognition of

this philosophy, all managers and supervisors are responsible for:

1. Placing safety on a priority level with production, quality, cost control and good employee relations.
2. Assuring that all work hazards/exposures are controlled and managed.
3. Assuring that all employees are appropriately trained before being assigned to work.
4. Assuring adherence to safe operation procedures/safety rules as a condition of employment.

OCTOBER 1993
**Handwriting omitted*

[page 25] **DRESS CODE AND UNIFORMS**

All employees must follow U.S.D.A. and safety rules detailing their manner of dress. Please pay careful attention to these rule1or the sake of your own good health and product quality.

FOOT WEAR

In addition to meeting U.S.D.A requirements all footwear worn in the plans areas of Barber Foods must pass a safety inspection at all times. No high heels are permitted and 75% of the sole must be adequately treaded. Failure of the inspection will mean issuance and acceptance of company furnished footwear or suspension.

U.S.D.A. RULES

1. Must keep your person and clothes clean and odor free.
2. Must wear clean white coats in production area.
3. Wear hair nets in production area.
4. No opened toed or open heeled shoes.
5. No nail polish unless you wear gloves.

6. No dangling or multipart jewelry.
7. No rings with stones unless wearing gloves.
8. No buttons, badges, pins or stickers to be warn on outer clothing.
9. No aprons and/or white coats to be worn in toilet areas.
10. All employees must wash hands upon leaving toilet areas.
11. Do not carry anything in upper pocket of white coat.
12. No spitting on floor, no wiping of nose while on the production line. Step back when coughing (cover mouth), wiping nose with handkerchief or paper towel and then wash hands.
13. Those wearing aprons must remove them before leaving production areas. This plies to production employees only.
14. Those not wearing aprons must remove white coats before leaving production areas. This applies to production employees only.
15. No food or beverages to be consumed in the restroom.

ISSUANCE OF PERSONAL EQUIPMENT

The company issues all necessary personal protective equipment such as aprons, white coats, hair nets, metal mesh gloves and safety glasses. You will not be charged for this equipment unless you lose it or intentionally damage it. See your supervisor if you need to exchange any equipment.

PERSONAL HYGIENE POLICY

As a company involved in food processing, it is necessary that certain minimum standards of personal hygiene and behavior be expected from all employees. In addition to any procedures or policies outlined elsewhere in this program, you are expected to take sufficient care of yourself and your

clothing so as not to offend your co-workers or be a source of concern or embarrassment to the company.

OCTOBER 1993
**Handwriting omitted.*

Exhibit 15
Barber Foods
Job Description

JOB TITLE: Production Worker

Exempt (Y/N): No SALARY LEVEL:
DEPARTMENT: Operations
PREPARED BY: Human Resources DATE:

SALARY: Performs repetitive bench or line assembly operations to mass-produce products.

ESSENTIAL DUTIES AND RESPONSIBILITIES include the following. Other duties may be assigned.

Performs routine, repetitive assembly or the production of finished goods.

Responsible for assembling products according health and safety regulations. Ensures product is produced with top quality.

Performs duties that include, but are not limited to, inserting stuffing, arranging pieces and folding chicken.

SUPERVISORY RESPONSIBILITIES:
None.

QUALIFICATION REQUIREMENTS: To perform this job successfully, an individual must be able to perform each essential duty satisfactorily. The requirements listed below are representative of the knowledge, skill, and/or ability required. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.
**Handwriting omitted.*

EDUCATION and/or EXPERIENCE:
Typically has a basic level knowledge and no prior experience requirement.

PHYSICAL DEMANDS: The physical demands described here are representative of those that must be met by an employee to successfully perform the essential functions of this job. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

While performing the duties of this job, the employee is regularly required to use hands to finger, handle, or feel objects, tools, or controls and reach with hands and arms. The employee frequently is required to sit. The employee is occasionally required to stand. [Page 2]

The employee must occasionally lift and/or move up to 25 pounds. Specific vision abilities required by this job include close vision and the ability to adjust focus.

WORK ENVIRONMENT: The work environment characteristics described here are representative of those an employee encounters while performing the essential functions of this job. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

While performing the duties of this job, the employee regularly works near moving mechanical parts and is regularly exposed to extreme cold.

The noise level in the work environment is usually loud.

Exhibit 16
Barber Foods
Job Description

JOB TITLE: Sanitation II

entered 12/12/96

Exempt (Y/N): No SALARY LEVEL:
DEPARTMENT: Operations
PREPARED BY: Human Resources DATE:

SUMMARY: Performs the sanitation function including the cleaning of the entire production line to ensure sterilization.

ESSENTIAL DUTIES AND RESPONSIBILITIES include the following. Other duties may be assigned.

Responsible for the disassembly and assembly of complex production machinery. Ensures all equipment is assembled for first shift production.

Ensures all equipment is sanitized according to State and Federal regulations.

Uses dishwasher, pressure washers, and other mechnical aids to perform sanitary function.

Works directly with hazardous chemicals and equipment.

May be responsible for training lower level sanitation staff on proper procedures for sanitizing production equipment.

SUPERVISORY RESPONSIBILITIES:
None.

**Handwriting omitted.*

JOB LEVEL GUIDELINES:
Performs work that is routine in nature. Normally receives general supervision, although more detailed instructions are provided when performing new assignments. The incumbent uses established procedures and although not required, may exercise limited judgement and/or innovation. May assist in developing new methods for improving work processes and/or company operations.

QUALIFICATION REQUIREMENTS: To perform this job successfully, an individual must be able to perform each essential duty satisfactorily. The requirements listed below are representative of the knowledge, skill, and/or ability required. Reasonable accommodations may be made to enable individuals with
disabilities to perform the essential functions. [Page 2]

Job Description
Job Title: Sanitation II

EDUCATION and/or EXPERIENCE:
Typically has a high school level of knowledge or equivalent and one to twelve months of related experience.

PHYSICAL DEMANDS: The physical demands described here are representative of those that must be met by an employee to successfully perform the essential functions of this job. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

While performing the duties of this job, the employee is regularly required to stand and use hands to finger, handle, or feel objects, tools, or controls. The employee is occasionally required to walk, reach with hands and arms, and talk or hear.

The employee must occasionally lift and/or move up to 40 pounds. Specific vision abilities required by this job include close vision, color vision, and the ability to adjust focus.

WORK ENVIRONMENT: The work environment characteristics described here are representative of those an employee encounters while performing the essential functions of this job. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

While performing the duties of this job, the employee is regularly exposed to toxic or caustic chemicals. The employee frequently works near moving mechanical parts. The employee is occasionally exposed to extreme cold. Must wear protective clothing, eyewear, and earwear.

The noise level in the work environment is usually loud.

Exhibit 17
Barber Foods
Job Description

JOB TITLE: Set-Up Operator I

Exempt (Y/N): No SALARY LEVEL:
DEPARTMENT: Operations
PREPARED BY: Human Resources DATE:

SUMMARY: Performs basic set-up operator duties, including monitoring controls, electronics, and programming of machines.

ESSENTIAL DUTIES AND RESPONSIBILITIES include the following. Other duties may be assigned.

Responsible for ensuring assigned equipment is set-up and running according to the production schedule.

May perform basic maintenance on machines. Contacts Maintenance Mechanic if necessary.

Responsible for ensuring all production equipment is set up according to production schedule, including labels, batter, stuffing, etc.

Interacts with Line Leads to determine equipment set-up and operation.

Ensures all production equipment is prepared on-time for production.
May be responsible for adjusting formers, batter, and packaging when production turn-overs occur.

**Handwriting omitted.*

SUPERVISORY RESPONSIBILITIES:
None.

JOB LEVEL GUIDELINES:
Performs work that is routine in nature. Normally receives very detailed and specific instructions. Opportunities for judgement and/or innovation are very rare. Competent in major elements of the job after moderately short training period.

QUALIFICATION REQUIREMENTS: To perform this job successfully, an individual must be able to perform each essential duty satisfactorily. The requirements listed below are representative of the knowledge, skill, and/or ability required. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions. [Page 2]

EDUCATION and/or EXPERIENCE:
Typically has a high school level of knowledge or equivalent and up to one month of related experience.

PHYSICAL DEMANDS: The physical demands described here are representative of those that must be met by an employee to successfully perform the essential functions of this job. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

While performing the duties of this job, the employee is regularly required to stand and use hands to finger, handle, or feel objects, tools, or controls. The employee is occasionally required to walk, sit, reach with hands and arms, and talk or hear.

The employee must occasionally lift and/or move up to 25 pounds. Specific vision abilities required by this job include close vision and the ability to adjust focus.

WORK ENVIRONMENT: The work environment characteristics described here are representative of those an employee encounters while performing the essential functions of this job. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

While performing he duties of this job, the employee is frequently exposed to extreme cold. Must wear protective clothing, eyewear, and earwear.

The noise level in the work environment is usually moderate.

Exhibit 18

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ABDELA TUM, NAJIBSAYED, CELSO FLORENDO and TADEUSZ OLSZYNSKI,	)	
Plaintiffs,	)	CIVIL NO.CV-OO-37 1-P-C
v.	)	
BARBER FOODS,	)	
Defendant.	)	

BARBER FOODS' ANSWERS TO
FIRST SET OF INTERROGATORIES

1. Identify and describe fully each and every policy, practice, and/or procedure of Barber Foods instructing, requiring, or recommending its hourly wage employees at its plant in Portland, Maine, to arrive at work prior to the beginning of their shifts in order to obtain, and/or change into sanitary, safety, or protective clothing, equipment, and/or gear and/or to obtain equipment, tools and/or gear, and describe the full and complete reason(s) each such policy, practice, and/or procedure was originated or implemented for use.

ANSWER: [page 2]

There is no such policy, practice or procedure. Barber Foods does allow associates to punch in up to six minutes before the start of their scheduled shift.

2. For each hourly wage job classification at Barber Foods, what are all of the specific job duties and responsibilities?

ANSWER:

See the Job Descriptions which were provided under Attachment B to the responses to the first set of document requests.

3. For each hourly wage job classification at Barber Foods, what sanitary, safety, or protective clothing, equipment, and/or gear and/or equipment, tools and/or gear, are hourly wage employees required to wear and/or use?

ANSWER:

Line Workers:	coat, hair net, beard cover (if applicable), hearing protection, sleeves, back belt (if a lugger);
Set-up Operators:	coat, hair net, beard cover (if applicable), hearing protection, sleeves, back belt, safety glasses, safety boots, LOTO, tools;
Shipping:	coat, hair net, beard cover (if applicable), hearing protection, safety shoes, bump or hard hat;
Meat Room:	coat, hair net, beard cover (if applicable), hearing protection, safety glasses, safety boots, bump hat;

Cook Room: coat, hair net, beard cover (if applicable), hearing [page 5]

6. Does Barber Foods require hourly wage employees to clean, repair, or maintain clothing, equipment, gear, or tools? If so, provide details regarding which hourly wage employees are required to do so, and describe fully and specifically the nature of such duties.

ANSWER:

Associates in the sanitation department hose off their rain gear while they are still wearing it and while they are still on the clock. The gear is then hung on hooks in the locker room, in the associates' lockers, or on hooks in the chemical room.

7. Describe in detail all method(s) by which Barber Foods records, computes, measures, monitors, and/or memorializes the attendance, work time, and break time of its hourly wage employees, and specify in detail any changes, and full and complete reasons therefore, to such method(s) at any time since December 1, 1997.

ANSWER:

Barber Foods utilizes a computerized time and attendance system. Each associate has a swipe card with a bar code. The system downloads clock punches into the payroll software. Crew and line leads are responsible for monitoring time punch accuracy and attendance. The leads are supposed to check the computer daily to check associate punches. They also receive a weekly printout of the associates' daily punches. The leads are also responsible for monitoring and entering into the [page 6] computer any time off, such as excused or unexcused absences,

arriving late or leaving early, leaves, vacation, paid time off, etc. There have been no appreciable changes in the system since December 1997.

8. Identify every person known to Barber Foods to have had any responsibility or involvement in the recording, computation, measurement, monitoring, and/or memorialization of the attendance, work time, and break time of Barber Foods' hourly wage employees or in the supervision of Barber Foods, hourly wage employees and specify the job duties and responsibilities of each such person and the time frames during which such person had those duties or responsibilities.

ANSWER:

As described in the response to interrogatory #7, crew and line leads, supervisors, and managers are responsible for monitoring attendance and the accuracy of associate clock punches. They are identified in the organizational charts which were provided under Attachment 9 to the response to the first set of document requests. Their job duties are described in the job descriptions which were provided under Attachment B to the responses to the first set of interrogatories.

9. What are the meanings of the terms "line time" and "break time" or any similar terms, as used by Barber Foods?

Exhibit 19

PERSONAL PROTECTIVE EQUIPMENT

PURPOSE

The purpose of this procedure is to identity and provide personal protective equipment appropriate and adequate to control personal exposure to hazards.

OBJECTIVE
COMPLIANCE MEASURES

Where an item of Personal Protective Equipment is specified in the company P.P.E. analysis (as well as in job procedures or by signage), it must be readily available, Use is mandatory and it is expected that work area managers and supervisors enforce use.

All associates who are required to use Personal Protective Equipment (P.P.B.) have been trained. (What the hazard is, why P.P.E. is necessary, how to use it effectively, what it can be expected to do and not do, how to care for it and when to replace it.)

PROTECTIVE EQUIPMENT USUALLY CONSIDERED

>**Vision** hazard: safety glasses, goggles (chemical goggles, burning goggles, flying particle goggles), lace shields, area or process shields
>**Face** hazard: face shields, chemical hoods, welding hoods, process shields
>**Head** hazards: hard hat or bump hat
>**Hearing** hazard: see "hearing protection" procedure
>**Breathing** hazard: see "respiratory protection" procedure
>**Chest (body)** hazards: chemical aprons to protect from caustic chemicals or hot material (hot glue); **rubber** chemical

**Handwriting omitted*

jackets (no vinyl rain gear if the hazard is a caustic or acid)
>**Hand** hazards: a **wide variety** of gloves, each designed to address different kinds of hazards. No one glove can address all hazards. Gloves come in sizes and must fit the user. (consider: liquids, heat, cold)
>**Arm / skin** hazards: Rubber, vinyl or plastic arm shields protect the wrists and upper arms from splashing liquids (no vinyl if the hazard is a caustic or acid)
>**Leg / skin** hazards: **Rubber** rain pants (no vinyl rain gear if the hazard is a caustic or acid)
>**Foot / toe** hazards: Slip-resistant soles, steel-toed work boots.
January, 1999

Exhibit 20

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ABDELA TUM, et al.	)	
	)	
vs.	)	**Case No. 00-371-P-C**
	)	
BARBER FOODS, INC., d/b/a BARBER FOODS,	)	
	)	
Defendant.	)	

PLAINTIFF NICHOLAS ALAN BEARCE'S ANSWERS TO DEFENDANT BARBER FOODS' INTERROGATORIES

COMES NOW Plaintiff Nicholas Alan Bearce, objects and responds to the Defendant's Interrogatories as follows:

GENERAL OBJECTIONS

1. The Plaintiff objects to the definitions and instructions accompanying these interrogatories to the extent that they seek to impose burdens, duties and obligations upon the Plaintiff in excess of or different from those imposed by applicable law and the Federal Rules of Civil Procedure; Plaintiff will respond in accordance with said law and rules.

2. The Plaintiff objects to these interrogatories to the extent that they are overly burdensome and seek information regarding matters about which the Defendant, Barber Foods, has knowledge.

3. The Plaintiff objects to these interrogatories to the extent they seek to discover "core" work product, including the disclosure of the mental impressions, conclusions, opinions, and/or legal theories of attorneys or other representatives of the Plaintiff.

4. The Plaintiff objects to these interrogatories and document requests to the extent they seek information protected by the attorney-client privilege or any other applicable privilege.

5. The Plaintiff objects to these interrogatories and document requests to the extent that the information sought, if any, was obtained and prepared in anticipation of litigation and the Defendant has not made the required showing of substantial need for the [Page 2] information or that the substantial equivalent of such information is unobtainable by other means. The Plaintiff further objects to these interrogatories to the extent that the information called for, if any, is privileged and is not discoverable under Fed. R. Civ. P. Rule 26(b)(3) and *Hickman v. Taylor*, 329 U.S. 495 (1947).

6. The Plaintiff objects to these interrogatories to the extent that they seek to require the Plaintiff's attorneys to divulge the substance of information developed by them, including the subject matter of each discussion with Plaintiff's counsel (*i.e.*, interpretive, not investigatory) in preparation for the trial of this action.

7. The Plaintiff objects to these interrogatories to the extent that they are oppressive, i.e., they were designed to create an unreasonable burden on the Plaintiff, which burden is not commensurate with the professed result sought.

The Plaintiff answers the specific Interrogatories as follows:

Interrogatory No. 1: *State all job positions held by you at Barber Foods from December 1, 1997 to the present; include in your answer the shift on which you worked in each position.*

Answer to Interrogatory No. 1: Maintenance Engineer on first and second shift.

Interrogatory No. 2: *Identify in chronological order your immediate supervisor(s) from December 1, 1997 to the present.*

Answer to Interrogatory No. 2: Mark Duest, Bruce McIntyre, and Richard. I do not remember Richard's last name.

Interrogatory No. 3: *Identify any person from whom you or your representatives have obtained a written or recorded statement.*

Answer to Interrogatory No. 3: None that I am aware of.

Interrogatory No. 4: *Identify any person who made any comments or statements or took any action which you contend was intended to or had the effect of discouraging any Barber Foods' employee from participating in this lawsuit, or in any way threatened, explicitly or implicitly, retaliation or repercussion if an employee participated; describe as well the substance of any such comment, statement, or action.*

Answer to Interrogatory No. 4: None that I am aware of.

Interrogatory No. 5: *Identify any person who ever instructed or recommended, or told you that you were required, to arrive at work before the beginning* [Page 3] *of your scheduled shift; describe the substance of what you were told by each such person.*

Answer to Interrogatory No. 5: Bruce Macintyre told me to get to work 15 minutes early to get ready for the shift.

Interrogatory No. 6: *At any time after December 1, 1997, were you ever denied the opportunity to go to the bathroom during a shift? If so, how many times, when, and identify the person who refused permission.*

Answer to Interrogatory No. 6: No.

Interrogatory No. 7: *At any time after December 1, 1997, were you ever required to visit the medical office during your unpaid break? If so, how many times, when, and identify the person who required you to visit the office during this time.*

Answer to Interrogatory No. 7: Yes. I had to go to the nurse's office during my lunch break about 3-4 times. Each visit lasted approximately 30 minutes.

Interrogatory No. 8: *For all job positions held by you after December 1, 1997, state all sanitary, safety or protective clothing, equipment, or gear which you were required to wear.*

Answer to Interrogatory No. 8: Boots, coveralls, snow suits, hair and beard nets, gloves, white coat, ear plugs, back belt, bump hat, tools. Depending on the area in which I work, I sometimes also was required to wear sleeve covers, safety glasses, or an apron.

Interrogatory No. 9: *For all job positions held by you after December 1, 1997, state all sanitary safety, or protective clothing, equipment, or gear which was optional and which you chose to wear.*

Answer to Interrogatory No. 9: None that I know of.

Interrogatory No. 10: *At any time after December 1, 1997, did you have a locker at Barber Foods? If so, state:*

a. Which clothing, equipment, or gear did you generally store in your locker;

b. Which clothing, equipment, or gear did you generally bring home with you.

Answer to Interrogatory No. 10:

a. Bump hat, coveralls, back belt, tools, safety glasses, shoes [Page 4]

b. Tools.

Interrogatory No. 11: *Describe specifically all work performed by you before clocking in at the beginning of your scheduled shift for which you claim you were entitled to be paid but were not paid for.*

Answer to Interrogatory No. 11: Walking from the building entrance to my locker, putting equipment on, going to the supply area in the maintenance shop, getting equipment from the supply area, and double checking my tools.

Interrogatory No. 12: *Describe specifically all work performed by you between clocking in at the beginning of your scheduled shift and clocking out at the end of your*

scheduled shift for which you claim you were entitled to be paid but were not paid for.

Answer to Interrogatory No. 12: I typically was not permitted to take time off during the two paid breaks and, instead, I had to work through these breaks. On one occasion when I asked for a break, Mark told me, "You actually want a break? You're working in the wrong department." Additionally, I typically only got approximately 15 minute lunch break, even though lunch break was supposed to last 30 minutes, and 30 minutes were deducted from my paycheck for lunch. During my lunch break, I also took approximately 5 minutes to take off some of my equipment, walk to the break area, walk back from the break area, and put my equipment back on. I also had to visit the nurse's office approximately 3-4 times during my lunch break, each visit for approximately 30 minutes.

Interrogatory No. 13: *Describe specifically all work performed by you after clocking out at the end of your scheduled shift for which you claim you were entitled to be paid but were not paid for.*

Answer to Interrogatory No. 13: Taking off my clothing, equipment, and gear, putting equipment away in my locker, throwing away or laundering equipment, walking among my work area, to throw away or launder equipment, and cleaning my tools.

Interrogatory No. 14: *From December 11, 1997 to the present, state specifically, by date and amount of minutes and/or hours each date, all uncompensated work time performed by you before clocking in at the beginning of your scheduled shift for which you claim you were entitled to be compensated.*

Answer to Interrogatory No. 14: See Answer to Interrogatory No. 11. Each day, this procedure took approximately 10-15 minutes.

Interrogatory No. 15: *From December 11, 1997 to the present, state* [Page 5] *specifically, by date and amount of minutes and/or hours each date, all uncompensated work time performed by you between clocking in at the beginning of your scheduled shift and clocking out at the end of your scheduled shift for which you claim you were entitled to be compensated.*

Answer to Interrogatory No. 15: See Answer to Interrogatory No. 12.

Interrogatory No. 16: *From December 11, 1997 to the present, state specifically, by date and amount of minutes and/or hours each date, all uncompensated work time performed by you after clocking out at the end of your scheduled shift for which you claim you were entitled to be compensated.*

Answer to Interrogatory No. 16: See Answer to Interrogatory No. 13. Each day, this procedure took approximately 20-25 minutes.

Interrogatory No. 17: *From December 11, 1997 to the present, state specifically by date and amount of minutes and/or hours each date, all uncompensated time spent visiting the medical office for which you claim you were entitled to be compensated.*

Answer to Interrogatory No. 17: I had to visit the nurse's office approximately 3-4 times during my lunch break, each visit for approximately 30 minutes.

[Page 6] I declared under penalty of perjury that the foregoing is true and correct.

Dated 11/8, 2001 _____

Nicholas Alan Bearce

**Handwriting omitted.*

Exhibit 21

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ABDELA TUM, et al.	)	
	)	
vs.	)	**Case No. 00-371-P-C**
	)	
BARBER FOODS, INC., d/b/a BARBER FOODS,	)	
	)	
Defendant.	)	

PLAINTIFF ALLISON CAREY'S ANSWERS TO DEFENDANT BARBER FOODS' INTERROGATORIES

COMES NOW Plaintiff Allison Carey, objects and responds to the Defendant's Interrogatories as follows:

GENERAL OBJECTIONS

2. The Plaintiff objects to the definitions and instructions accompanying these interrogatories to the extent that they seek to impose burdens, duties and obligations upon the Plaintiff in excess of or different from those imposed by applicable law and the Federal Rules of Civil Procedure; Plaintiff will respond in accordance with said law and rules.

2. The Plaintiff objects to these interrogatories to the extent that they are overly burdensome and seek information regarding matters about which the Defendant, Barber Foods, has knowledge.

3. The Plaintiff objects to these interrogatories to the extent they seek to discover "core" work product, including the disclosure of the mental impressions, conclusions, opinions, and/or legal theories of attorneys or other representatives of the Plaintiff.

4. The Plaintiff objects to these interrogatories and document requests to the extent they seek information protected by the attorney-client privilege or any other applicable privilege.

5. The Plaintiff objects to these interrogatories and document requests to the extent that the information sought, if any, was obtained and prepared in anticipation of litigation and the Defendant has not made the required showing of substantial need for the [Page 2] or that the substantial equivalent of such information is unobtainable by other means. The Plaintiff further objects to these interrogatories to the extent that the information called for, if any, is privileged and is not discoverable under Fed. R. Civ. P. Rule 26(b)(3) and *Hickman v. Taylor*, 329 U.S. 495 (1947).

6. The Plaintiff objects to these interrogatories to the extent that they seek to require the Plaintiff's attorneys to divulge the substance of information developed by them, including the subject matter of each discussion with Plaintiff's counsel (*i.e.*, interpretive, not investigatory) in preparation for the trial of this action.

7. The Plaintiff objects to these interrogatories to the extent that they are oppressive, i.e., they were designed to create an unreasonable burden on the Plaintiff, which burden is not commensurate with the professed result sought.

The Plaintiff answers the specific Interrogatories as follows:

Interrogatory No. 1: *State all job positions held by you at Barber Foods from December 1, 1997 to the present; include in your answer the shift on which you worked in each position.*

Answer to Interrogatory No. 1: When I was first hired at Barber, I spent two weeks training as a Line Worker on first shift. I then switched to second shift for approximately 4-6 months. Then I transferred to first shift, still as a Line Worker, and later did administrative work for the meat room on first shift.

Interrogatory No. 2: *Identify in chronological order your immediate supervisor(s) from December 1, 1997 to the present.*

Answer to Interrogatory No. 2: Sonya Dobson, Cathy Smith, Stefan Post, Wendy Walker.

Interrogatory No. 3: *Identify any person from whom you or your representatives have obtained a written or recorded statement.*

Answer to Interrogatory No. 3: No one that I know of.

Interrogatory No. 4: *Identify any person who made any comments or statements or took any action which you contend was intended to or had the effect of discouraging any Barber Foods' employee from participating in this lawsuit, or in any way threatened, explicitly or implicitly, retaliation or repercussion if an employee participated; describe as well the substance of any such comment, statement, or action.*

Answer to Interrogatory No. 4: No one that I know of. [Page 3]

Interrogatory No. 5: *Identify any person who ever instructed or recommended, or told you that you were required, to arrive at work before the beginning of your scheduled shift; describe the substance of what you were told by each such person.*

Answer to Interrogatory No. 5: No one that I know of.

Interrogatory No. 6: *At any time after December 1, 1997, were you ever denied the opportunity to go to the bathroom during a shift? If so, how many times, when, and identify the person who refused permission.*

Answer to Interrogatory No. 6: I was denied the opportunity to use the rest room by Stefan, his Rotator, Trang Martin, and Wendy Walker, though I do not remember how many times or when.

Interrogatory No. 7: *At any time after December 1, 1997, were you ever required to visit the medical office during your unpaid break? If so, how many times, when, and identify the person who required you to visit the office during this time.*

Answer to Interrogatory No. 7: I was required to visit the offsite Medical Office approximately 2-3 times for serious injuries, and the onsite medical center approximately 10 times. Of the ten onsite visits, about half were with the nurse and about half were with the doctor. Each onsite visit with the nurse took approximately 5-10 minutes and each onsite visit with the doctor took approximately 30 minutes. Offsite visits took longer.

Interrogatory No. 8: *For all job positions held by you after December 1, 1997, state all sanitary, safety or protective clothing, equipment, or gear which you were required to wear.*

Answer to Interrogatory No. 8: For line work I wore a hairnet, gloves, ear plugs, coat liners, and safety glasses. For the meat room I wore all of the above as well as rubber boots, apron, and a hard hat. For Packout 2, I wore all of the above and gloves, a coat, and ear plugs.

Interrogatory No. 9: *For all job positions held by you after December 1, 1997, state all sanitary safety, or protective clothing, equipment, or gear which was optional and which you chose to wear.*

Answer to Interrogatory No. 9: Gloves and safety glasses or a mask.

Interrogatory No. 10: *At any time after December 1, 1997, did you have a locker at Barber Foods? If so, state:*
[Page 4]

a. *Which clothing, equipment, or gear did you generally store in your locker;*

b. *Which clothing, equipment, or gear did you generally bring home with you.*

Answer to Interrogatory No. 10:

a. Clipboard, boots, hard hat, personal coat and Purse

b. Coat and purse; if they had a locker inspection, which happened about every month or two, I would have to bring everything home.

Interrogatory No. 11: *Describe specifically all work performed by you before clocking in at the beginning of*

your scheduled shift for which you claim you were entitled to be paid but were not paid for.

Answer to Interrogatory No. 11: Every day I worked I had to arrive at least an hour early to put my belongings in my locker, get a hair net, gloves, ear plugs, coat liners, safety glasses, and wait in line for all of these items. I spent additional time traveling among the plant, from the entrance, to the supply area on the ground floor, to the punch clock on the second floor. Often times I was required to walk through the entire plant to get to the punch clock.

Interrogatory No. 12: *Describe specifically all work performed by you between clocking in at the beginning of your scheduled shift and clocking out at the end of your scheduled shift for which you claim you were entitled to be paid but were not paid for.*

Answer to Interrogatory No. 12: Every day I worked, I spent between 18-24 minutes of my breaks removing gear and traveling from my station to the break area and back. During my shift I had three breaks, each of which I spent approximately 6-8 minutes removing gear and traveling among the plant.

Interrogatory No. 13: *Describe specifically all work performed by you after clocking out at the end of your scheduled shift for which you claim you were entitled to be paid but were not paid for.*

Answer to Interrogatory No. 13: Removing my gear, traveling from my station to the other side of the plant, waiting to get down the stairs to go to the locker room. This totals approximately 10-15 minutes for every day I worked.

Interrogatory No. 14: *From December 11, 1997 to the present, state specifically, by date and amount of minutes and/or hours each date, all uncompensated work time performed by you before clocking in at the beginning of your scheduled shift for which you claim you were entitled to be compensated.* [Page 5]

Answer to Interrogatory No. 14: See Answer to Interrogatory No. 11. Additionally, I spent a total of about 15 hours helping set up the Packout 2 line before clocking in.

Interrogatory No. 15: *From December 11, 1997 to the present, state specifically, by date and amount of minutes and/or hours each date, all uncompensated work time performed by you between clocking in at the beginning of your scheduled shift and clocking out at the end of your scheduled shift for which you claim you were entitled to be compensated.*

Answer to Interrogatory No. 15: See Answer to Interrogatory No. 12.

Interrogatory No. 16: *From December 11, 1997 to the present, state specifically, by date and amount of minutes and/or hours each date, all uncompensated work time performed by you after clocking out at the end of your scheduled shift for which you claim you were entitled to be compensated.*

Answer to Interrogatory No. 16: See Answer to Interrogatory No. 13.

Interrogatory No. 17: *From December 11, 1997 to the present, state specifically by date and amount of minutes and/or hours each date, all uncompensated time spent visiting the medical office for which you claim you were entitled to be compensated.*

Answer to Interrogatory No. 17: See Answer to Interrogatory No. 7.

[Page 6] I declare under penalty of perjury that the foregoing is true and correct.

Dated: 11-8-01, 2001

Allison Carey

*Handwriting omitted.

Exhibit 22

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ABDELA TUM, et al.	)	
	)	
vs.	)	**Case No. 00-371-P-C**
	)	
BARBER FOODS, INC., d/b/a BARBER FOODS,	)	
	)	
Defendant.	)	

PLAINTIFF ALBERT R. HOWARD, JR'S ANSWERS TO DEFENDANT BARBER FOODS' INTERROGATORIES

COMES NOW Plaintiff Albert R. Howard, Jr., objects and responds to the Defendant's Interrogatories as follows:

GENERAL OBJECTIONS

1. The Plaintiff objects to the definitions and instructions accompanying these interrogatories to the extent that they seek to impose burdens, duties and obligations upon the Plaintiff in excess of or different from those imposed by applicable law and the Federal Rules of Civil Procedure; Plaintiff will respond in accordance with said law and rules.

2. The Plaintiff objects to these interrogatories to the extent that they are overly burdensome and seek information regarding matters about which the Defendant, Barber Foods, has knowledge.

3. The Plaintiff objects to these interrogatories to the extent they seek to discover "core" work product, including the disclosure of the mental impressions, conclusions, opinions, and/or legal theories of attorneys or other representatives of the Plaintiff.

4. The Plaintiff objects to these interrogatories and document requests to the extent they seek information protected by the attorney-client privilege or any other applicable privilege.

5. The Plaintiff objects to these interrogatories and document requests to the extent that the information sought, if any, was obtained and prepared in anticipation of litigation and the Defendant has not made the required showing of substantial need for the [Page 2] information or that the substantial equivalent of such information is unobtainable by other means. The Plaintiff further objects to these interrogatories to the extent that the information called for, if any, is privileged and is not discoverable under Fed. R. Civ. P. Rule 26(b)(3) and *Hickman v. Taylor*, 329 U.S. 495 (1947).

6. The Plaintiff objects to these interrogatories to the extent that they seek to require the Plaintiff's attorneys to divulge the substance of information developed by them, including the subject matter of each discussion with Plaintiff's counsel (*i.e.*, interpretive, not investigatory) in preparation for the trial of this action.

7. The Plaintiff objects to these interrogatories to the extent that they are oppressive, i.e., they were designed to create an unreasonable burden on the Plaintiff, which burden is not commensurate with the professed result sought.

The Plaintiff answers the specific Interrogatories as follows:

Interrogatory No. 1: *State all job positions held by you at Barber Foods from December 1, 1997 to the present; include in your answer the shift on which you worked in each position.*

Answer to Interrogatory No. 1: Sanitation worker on third shift from December 1, 1997 until approximately until the end of 1999.

Interrogatory No. 2: *Identify in chronological order your immediate supervisor(s) from December 1, 1997 to the present.*

Answer to Interrogatory No. 2: Ken Shayloff, Ray Bragg

Interrogatory No. 3: *Identify any person from whom you or your representatives have obtained a written or recorded statement.*

Answer to Interrogatory No. 3: None

Interrogatory No. 4: *Identify any person who made any comments or statements or took any action which you contend was intended to or had the effect of discouraging any Barber Foods' employee from participating in this lawsuit, or in any way threatened, explicitly or implicitly, retaliation or repercussion if an employee participated; describe as well the substance of any such comment, statement, or action.*

Answer to Interrogatory No. 4: None

Interrogatory No. 5: *Identify any person who ever instructed or recommended, or told you that you were required, to arrive at work before the beginning* [Page 3] *of your scheduled shift; describe the substance of what you were told by each such person.*

Answer to Interrogatory No. 5: Supervisors Ray Bragg and Ken Shayloff told me at orientation that if I did not have all my protective clothing, gear, and equipment on when it was time to punch in, I would be reprimanded.

Interrogatory No. 6: *At any time after December 1, 1997, were you ever denied the opportunity to go to the bathroom during a shift? If so, how many times, when, and identify the person who refused permission.*

Answer to Interrogatory No. 6: Supervisor Ken Shayloff attempted on several occasions throughout my employment at Barber to deny me the opportunity to use the bathroom during my shift but I went anyway.

Interrogatory No. 7: *At any time after December 1, 1997, were you ever required to visit the medical office during your unpaid break? If so, how many times, when, and identify the person who required you to visit the office during this time.*

Answer to Interrogatory No. 7: I was instructed by Supervisor Ken Shayloff to visit the medical office during my unpaid break approximately four or five times throughout my employment at Barber.

Interrogatory No. 8: *For all job positions held by you after December 1, 1997, state all sanitary, safety or protective clothing, equipment, or gear which you were required to wear.*

Answer to Interrogatory No. 8: White coat, hairnet, beard net, blue rubber gloves, white gloves, cotton glove liners, sleeve covers, earplugs, safety glasses, hard hat, back belt, rain gear, rubber boots.

Interrogatory No. 9: *For all job positions held by you after December 1, 1997, state all sanitary safety, or protective clothing, equipment, or gear which was optional and which you chose to wear.*

Answer to Interrogatory No. 9: Sweatshirt

Interrogatory No. 10: *At any time after December 1, 1997, did you have a locker at Barber Foods? If so, state:*

a. Which clothing, equipment, or gear did you generally store in your locker;

b. Which clothing, equipment, or gear did you generally bring home with you. [Page 4]

Answer to Interrogatory No. 10:

a. rain gear, sleeve covers, boots, safety glasses, hard hat, back belt

b. none

Interrogatory No. 11: *Describe specifically all work performed by you before clocking in at the beginning of your scheduled shift for which you claim you were entitled to be paid but were not paid for.*

Answer to Interrogatory No. 11: Going to supply room and to my locker, getting equipment, getting dressed in protective clothing and gear, going to coat room and looking for my size, and going to the cafeteria to do required exercises.

Interrogatory No. 12: *Describe specifically all work performed by you between clocking in at the beginning*

of your scheduled shift and clocking out at the end of your scheduled shift for which you claim you were entitled to be paid but were not paid for.

Answer to Interrogatory No. 12: The majority of my 30 minute break was spent doing exercises, getting undressed and dressed in protective clothing, and walking to and from the break room. We were additionally given a fifteen minute break approximately once or twice a week. I spent the majority of this break getting undressed and then redressed in my protective clothing.

Interrogatory No. 13: *Describe specifically all work performed by you after clocking out at the end of your scheduled shift for which you claim you were entitled to be paid but were not paid for.*

Answer to Interrogatory No. 13: Waiting in line to punch out, removing, throwing away, and laundering equipment, going to my locker taking off protective clothing and gear, dressing in my own clothes, and walking to the exit.

Interrogatory No. 14: *From December 1, 1997 to the present, state specifically, by date and amount of minutes and/or hours each date, all uncompensated work time performed by you before clocking in at the beginning of your scheduled shift for which you claim you were entitled to be compensated.*

Answer to Interrogatory No. 14: Each day I worked, it took me 2 minutes to walk from the entrance to the supply room and to my locker. It took 10 minutes to get dressed in my protective clothing and gear. It took approximately 5-10 minutes to go to the coat room and look for my size. The exercises took about 5-6 minutes.

Interrogatory No. 15: *From December 1, 1997 to the present, state specifically,* [Page 5] *by date and amount of minutes and/or hours each date, all uncompensated work time performed by you between clocking in at the beginning of your scheduled shift and clocking out at the end of your scheduled shift for which you claim you were entitled to be compensated.*

Answer to Interrogatory No. 15: Every day during my 30 minute break, I was required to do exercises which took about 5-6 minutes. Getting undressed and dressed in my protective clothing and gear took a total of approximately 20 minutes. During my occasional fifteen minute break, it would take me approximately 10 minutes to undress and redress so I ended up with about 5 minutes for myself.

Interrogatory No. 16: *From December 1, 1997 to the present, state specifically, by date and amount of minutes and/or hours each date, all uncompensated work time performed by you after clocking out at the end of your scheduled shift for which you claim you were entitled to be compensated.*

Answer to Interrogatory No. 16: Every day, I would wait in line to punch out for about 10-15 minutes. Removing, throwing away, and laundering equipment took approximately 2 minutes. Walking to the locker room took about another 2 minutes. It took approximately 8 minutes to get undressed and dressed and about another 2 minutes to walk to the exit.

Interrogatory No. 17: *From December 1, 1997 to the present, state specifically by date and amount of minutes and/or hours each date, all uncompensated time spent visiting the medical office for which you claim you were entitled to be compensated.*

Answer to Interrogatory No. 17: I visited the medical office during my unpaid break about four or five times throughout my employment at Barber, approximately 30 minutes each visit.

[Page 6] I declare under penalty of perjury that the foregoing is true and correct.

Dated: 11/4, 2001

Albert R. Howard, Jr.

**Handwriting omitted.*

Exhibit 23

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ABDELA TUM, et al.	)	
	)	
vs.	)	**Case No. 00-371-P-C**
	)	
BARBER FOODS, INC., d/b/a BARBER FOODS,	)	
	)	
Defendant.	)	

PLAINTIFF ROBERT HUNTLEY'S ANSWERS TO DEFENDANT BARBER FOODS' INTERROGATORIES

COMES NOW Plaintiff Robert Huntley, objects and responds to the Defendant's Interrogatories as follows:

GENERAL OBJECTIONS

3. The Plaintiff objects to the definitions and instructions accompanying these interrogatories to the extent that they seek to impose burdens, duties and obligations upon the Plaintiff in excess of or different from those imposed by applicable law and the Federal Rules of Civil Procedure; Plaintiff will respond in accordance with said law and rules.

2. The Plaintiff objects to these interrogatories to the extent that they are overly burdensome and seek information regarding matters about which the Defendant, Barber Foods, has knowledge.

3. The Plaintiff objects to these interrogatories to the extent they seek to discover "core" work product, including the disclosure of the mental impressions, conclusions, opinions, and/or legal theories of attorneys or other representatives of the Plaintiff.

4. The Plaintiff objects to these interrogatories and document requests to the extent they seek information protected by the attorney-client privilege or any other applicable privilege.

5. The Plaintiff objects to these interrogatories and document requests to the extent that the information sought, if any, was obtained and prepared in anticipation of litigation and the Defendant has not made the required showing of substantial need for the information or that the substantial equivalent of such information is unobtainable [Page 2] by other means. The Plaintiff further objects to these interrogatories to the extent that the information called for, if any, is privileged and is privileged and is not discoverable under Fed. F. Civ. P. Rule 26(b)(3) and *Hickman v. Taylor*, 329 U.S. 495 (1947).

6. The Plaintiff objects to these interrogatories to the extent that they seek to require the Plaintiff's attorneys to divulge the substance of information developed by them, including the subject matter of each discussion with Plaintiff's counsel (*i.e.*, interpretive, not investigatory) in preparation for the trial of this action.

7. The Plaintiff objects to these interrogatories to the extent that they are oppressive, i.e., they were designed to create an unreasonable burden on the Plaintiff, which burden is not commensurate with the professed result sought.

The Plaintiff answers the specific Interrogatories as follows:

Interrogatory No. 1: *State all job positions held by you at Barber Foods from December 1, 1997 to the present; include in your answer the shift on which you worked in each position.*

Answer to Interrogatory No. 1: I started work as a Production line and Maintenance worker (Lugger) on December 20, 1999. I injured myself in February 2000 while I was shoveling snow and was put on light duty from February 2000 until June 2000. I worked the 2nd shift which was from 3 p.m. until 11 p.m.

Interrogatory No. 2: *Identify in chronological order your immediate supervisor(s) from December 1, 1997 to the present.*

Answer to Interrogatory No. 2: Han True

Interrogatory No. 3: *Identify any person from whom you or your representatives have obtained a written or recorded statement.*

Answer to Interrogatory No. 3: I have not received any such statement.

Interrogatory No. 4: *Identify any person who made any comments or statements or took any action which you contend was intended to or had the effect of* [Page 3] *discouraging any Barber Foods' employee from participating in this lawsuit, or in any way threatened, explicitly or implicitly, retaliation or repercussion if an employee participated; describe as well the substance of any such comment, statement, or action.*

Answer to Interrogatory No. 4: I have no knowledge of such comments or statements.

Interrogatory No. 5: *Identify any person who ever instructed or recommended, or told you that you were required, to arrive at work before the beginning of your scheduled shift; describe the substance of what you were told by each such person.*

Answer to Interrogatory No. 5: At orientation in December 1999, all new employees were told by Barber officials and Production line trainers to completely dress themselves before punching in upstairs. Trainers further defined the preliminary dressing procedure as follows: walk to the locker room, retrieve ear plugs and name tag from locker, stand in line for a shimmy coat and gloves, wait in another line for hairnets, rubber gloves and other supplies depending on the line I was scheduled to work, walk up the stairs and clock in to work on that particular line.

Interrogatory No. 6: *At any time after December 1, 1997, were you ever denied the opportunity to go to the bathroom during a shift? If so, how many times, when, and identify the person who refused permission.*

Answer to Interrogatory No. 6: I was not denied the opportunity to go to the bathroom during a shift; however, I had to wait until someone could cover my area before I could leave the line. I usually waited about 5 minutes after asking to go to the bathroom.

Interrogatory No. 7: *At any time after December 1, 1997, were you ever required to visit the medical office during your unpaid break? If so, how many times, when, and identify the person who required you to visit the office during this time.*

Answer to Interrogatory No. 7: Yes. I was told to go to the medical office for my physical examination when

I started at Barber in December 1999. My visit lasted one hour and I was not paid.

Interrogatory No. 8: *For all job positions held by you after December 1, 1997, state all sanitary, safety or protective clothing, equipment, or gear which you were required to wear.*

Answer to Interrogatory No. 8: [Page 4] I was required to wear a coat, rubber gloves, ear plugs, a hairnet, safety glasses when working close to machinery, safety belt and netted material over my shoes when working in the Cook Room (where food was cooked, frozen, packaged and sent out in one room).

Interrogatory No. 9: *For all job positions held by you after December 1, 1997, state all sanitary safety, or protective clothing, equipment, or gear which was optional and which you chose to wear.*

Answer to Interrogatory No. 9: I chose to wear the items listed in Interrogatory No. 8.

Interrogatory No. 10: *At any time after December 1, 1997, did you have a locker at Barber Foods? If so, state:*

c. Which clothing, equipment, or gear did you generally store in your locker;

d. Which clothing, equipment, or gear did you generally bring home with you.

Answer to Interrogatory No. 10:

a. Yes, I kept my ear plugs, name tag and safety belt in my locker.

b. No, I did not take equipment home with me.

Interrogatory No. 11: *Describe specifically all work performed by you before clocking in at the beginning of your scheduled shift for which you claim you were entitled to be paid but were not paid for.*

Answer to Interrogatory No. 11: At the beginning of my shift before I was allowed to clock in, I walked to my locker, retrieved ear plugs and name tag from my locker, stood in line for a shimmy coat and gloves, waited in another line for hairnets, rubber gloves and other supplies depending on the line I was scheduled to work, walked up the stairs and clocked in to work on a production line. This entire process took about 15 minutes, sometimes longer if the lines were long.

Interrogatory No. 12: *Describe specifically all work performed by you between clocking in at the beginning of your scheduled shift and clocking out at the end of your scheduled shift for which you claim you were entitled to be paid but were not paid for.*

Answer to Interrogatory No. 12: When I was required to work in the Cook Room, I had to undress and re-dress in [Page 5] all new gear. Managers required all new gear when entering the Cook Room. The process to undress took 5-10 minutes and it took approximately 10-15 minutes to re-dress depending on the length of the line. Also, at a managers request, I was required to punch out of one line and punch in on another line. This process took 2-5 minutes and I was not paid for any time I spent on the floor walking from one production line to another at the request of a manager.

Interrogatory No. 13: *Describe specifically all work performed by you after clocking out at the end of your scheduled shift for which you claim you were entitled to be paid but were not paid for.*

Answer to Interrogatory No. 13: I had to undress and put all of the gear in different bins so that it could be thrown away or laundered. This process took 10 minutes each shift.

Interrogatory No. 14: *From December 11, 1997 to the present, state specifically, by date and amount of minutes and/or hours each date, all uncompensated work time performed by you before clocking in at the beginning of your scheduled shift for which you claim you were entitled to be compensated.*

Answer to Interrogatory No. 14: The total amount of uncompensated time for work performed before clocking in at the beginning of my shift is 31 hours and 25 minutes.

25 weeks (12/20/99-6/9/01) x 3 shifts per week=75 shifts
75 shifts x 15 minutes at the beginning of each shift= 1,125 minutes or 18 hours and 45 minutes

Interrogatory No. 15: *From December 11, 1997 to the present, state specifically, by date and amount of minutes and/or hours each date, all uncompensated work time performed by you between clocking in at the beginning of your scheduled shift and clocking out at the end of your scheduled shift for which you claim you were entitled to be compensated.*

Answer to Interrogatory No. 15: The total amount of uncompensated time for work performed during my work day is 25 hours.

Cook Room:
25 weeks (12/20/99-6/9/01) x 2 shifts per week=50
50 shifts x 25 minutes (10 min. to undress and 15

min. to re-dress)=1,250 minutes

Line change: [Page 6]
25 weeks x 5 shifts per week=125 shifts
125 shifts x 2 minutes per shift=250 minutes
TOTAL: 1500 minutes or 25 hours

Interrogatory No. 16: *From December 11, 1997 to the present, state specifically, by date and amount of minutes and/or hours each date, all uncompensated work time performed by you after clocking out at the end of your scheduled shift for which you claim you were entitled to be compensated.*

Answer to Interrogatory No. 16: The total amount of uncompensated time for work performed after clocking out at the end of my scheduled shift is 4 hours and 15 minutes.

25 weeks x 5 shifts per week=125 shifts
125 shifts x 10 minutes= 250 minutes or 4 hours and 15 minutes

Interrogatory No. 17: *From December 11, 1997 to the present, state specifically by date and amount of minutes and/or hours each date, all uncompensated time spent visiting the medical office for which you claim you were entitled to be compensated.*

Answer to Interrogatory No. 17: I was not compensated for a visit to the medical office for one hour in December 1999.

[Page 7] I declare under penalty of perjury that the foregoing is true and correct.

Dated: 11-29-01, 2001

Robert Humtley

*Handwriting omitted.

Exhibit 24

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

ABDELA TUM, et al.	)	
	)	
vs.	)	**Case No. 00-371-P-C**
	)	
BARBER FOODS, INC., d/b/a BARBER FOODS,	)	
	)	
Defendant.	)	

PLAINTIFF KENNETH LAMARCHE'S ANSWERS TO DEFENDANT BARBER FOODS' INTERROGATORIES

COMES NOW Plaintiff Kenneth LaMarche, objects and responds to the Defendant's Interrogatories as follows:

GENERAL OBJECTIONS

4. The Plaintiff objects to the definitions and instructions accompanying these interrogatories to the extent that they seek to impose burdens, duties and obligations upon the Plaintiff in excess of or different from those imposed by applicable law and the Federal Rules of Civil Procedure; Plaintiff will respond in accordance with said law and rules.

2. The Plaintiff objects to these interrogatories to the extent that they are overly burdensome and seek information regarding matters about which the Defendant, Barber Foods, has knowledge.

3. The Plaintiff objects to these interrogatories to the extent they seek to discover "core" work product, including the disclosure of the mental impressions, conclusions, opinions, and/or legal theories of attorneys or other representatives of the Plaintiff.

4. The Plaintiff objects to these interrogatories and document requests to the extent they seek information protected by the attorney-client privilege or any other applicable privilege.

5. The Plaintiff objects to these interrogatories and document requests to the extent that the information sought, if any, was obtained and prepared in anticipation of litigation and the Defendant has not made the required showing of substantial need for the information or that the substantial equivalent of such information is unobtainable by other means. The Plaintiff further objects to these interrogatories to the extent that the information called for, if any, is privileged and is not discoverable under Fed. R. Civ. P. [Page 2] Rule 26(b)(3) and *Hickman v. Taylor*, 329 U.S. 495 (1947).

6. The Plaintiff objects to these interrogatories to the extent that they seek to require the Plaintiff's attorneys to divulge the substance of information developed by them, including the subject matter of each discussion with Plaintiff's counsel (*i.e.*, interpretive, not investigatory) in preparation for the trial of this action.

7. The Plaintiff objects to these interrogatories to the extent that they are oppressive, i.e., they were designed to create an unreasonable burden on the Plaintiff, which burden is not commensurate with the professed result sought.

The Plaintiff answers the specific Interrogatories as follows:

Interrogatory No. 1: *State all job positions held by you at Barber Foods from December 1, 1997 to the present; include in your answer the shift on which you worked in each position.*

Answer to Interrogatory No. 1: Third shift sanitation worker; Second shift production worker.

Interrogatory No. 2: *Identify in chronological order your immediate supervisor(s) from December 1, 1997 to the present.*

Answer to Interrogatory No. 2: My supervisor on third shift sanitation was Keith. I do not remember Keith's last name. I don't remember the names of the supervisors on second shift.

Interrogatory No. 3: *Identify any person from whom you or your representatives have obtained a written or recorded statement.*

Answer to Interrogatory No. 3: None that I am aware of.

Interrogatory No. 4: *Identify any person who made any comments or statements or took any action which you contend was intended to or had the effect of discouraging any Barber Foods' employee from participating in this lawsuit, or in any way threatened, explicitly or implicitly, retaliation or repercussion if an employee participated; describe as well the substance of any such comment, statement, or action.*

Answer to Interrogatory No. 4: None that I can recall.

Interrogatory No. 5: *Identify any person who ever instructed or recommended, or told you that you were required, to arrive at work before the beginning of your scheduled shift; describe the substance of what you were told by each such person.*

Answer to Interrogatory No. 5: A supervisor told me to arrive at work between 20 [Page 3] minutes to 30 minutes before shift. I do not remember the supervisor's name.

Interrogatory No. 6: *At any time after December 1, 1997, were you ever denied the opportunity to go to the bathroom during a shift? If so, how many times, when, and identify the person who refused permission.*

Answer to Interrogatory No. 6: Not that I can recall.

Interrogatory No. 7: *At any time after December 1, 1997, were you ever required to visit the medical office during your unpaid break? If so, how many times, when, and identify the person who required you to visit the office during this time.*

Answer to Interrogatory No. 7: Not that I can remember.

Interrogatory No. 8: *For all job positions held by you after December 1, 1997, state all sanitary, safety or protective clothing, equipment, or gear which you were required to wear.*

Answer to Interrogatory No. 8: White coat, rubber pants, rubber jacket, rubber boots, blue gloves, white cotton glove liner, sleeve cover, ear plugs, safety glasses,

bump hat, hair net, back belt, lock out-tag out equipment, and occasionally a purple apron.

Interrogatory No. 9: *For all job positions held by you after December 1, 1997, state all sanitary safety, or protective clothing, equipment, or gear which was optional and which you chose to wear.*

Answer to Interrogatory No. 9: None.

Interrogatory No. 10: *At any time after December 1, 1997, did you have a locker at Barber Foods? If so, state:*

e. Which clothing, equipment, or gear did you generally store in your locker;

f. Which clothing, equipment, or gear did you generally bring home with you.

Answer to Interrogatory No. 10:

a. Hat, boots, safety glasses, rubber jacket, rubber pants, rubber boots, lock out-tag out equipment.

b. Only when lockers were spray cleaned.

Interrogatory No. 11: *Describe specifically all work performed by you before clocking in at the beginning of your scheduled shift for which you claim you were entitled to be paid but were not paid for.*

Answer to Interrogatory No. 11: Walking from building entrance to area where white coats are, getting two white coats, gloves, and glove liners, waiting to get white [Page 4] coat, gloves, and glove liners, walking to my locker, putting on my gear at my locker, walking to the cafeteria to punch in.

Interrogatory No. 12: *Describe specifically all work performed by you between clocking in at the beginning*

of your scheduled shift and clocking out at the end of your scheduled shift for which you claim you were entitled to be paid but were not paid for.

Answer to Interrogatory No. 12: Typically I had to take some of my equipment and put it in my locker during breaks and lunch, and get the equipment from the locker and put it back on before the shift work resumed. Occasionally, when my equipment was drenched, I was allowed to go and get dry equipment during the shift.

Interrogatory No. 13: *Describe specifically all work performed by you after clocking out at the end of your scheduled shift for which you claim you were entitled to be paid but were not paid for.*

Answer to Interrogatory No. 13: Walking downstairs towards the locker room, and taking off equipment, laundering equipment, throwing away equipment, storing equipment in my locker, and walking from my locker to the building exit.

Interrogatory No. 14: *From December 11, 1997 to the present, state specifically, by date and amount of minutes and/or hours each date, all uncompensated work time performed by you before clocking in at the beginning of your scheduled shift for which you claim you were entitled to be compensated.*

Answer to Interrogatory No. 14: It took me approximately 5 minutes to walk from the building entrance to the area where white coats and gloves are kept. Typically, there was no wait to get white jacket and gloves, but sometimes there was a 2-minute wait. It took approximately 2 minutes to walk to my locker. It took approximately 20 minutes to put all rain gear and other gear on at my locker. It

took approximately another 3 minutes to walk to cafeteria to punch in.

It took me approximately 5 minutes less when I worked on second shift, because I did not have to wear rubber jacket, pants, or boots.

Interrogatory No. 15: *From December 11, 1997 to the present, state specifically, by date and amount of minutes and/or hours each date, all uncompensated work time performed by you between clocking in at the beginning of your scheduled shift and clocking out at the end of your scheduled shift for which you claim you were entitled to be compensated.*

Answer to Interrogatory No. 15: During lunch, I took off my rubber jacket, rubber pants, gloves, glove liners, and white coat and put them in my locker, which took about 5 minutes. It took approximately 5 minutes to put this equipment back on before resuming my shift work. During the shorter breaks, I would go downstairs and take off some of my equipment. The changing time during my breaks was approximately 2-3 [Page 5] minutes less when I worked on second shift. Approximately 5 times, I was completely denied a break.

Interrogatory No. 16: *From December 11, 1997 to the present, state specifically, by date and amount of minutes and/or hours each date, all uncompensated work time performed by you after clocking out at the end of your scheduled shift for which you claim you were entitled to be compensated.*

Answer to Interrogatory No. 16: After punch out, it would take approximately 5 minutes to go downstairs and take off gloves, liners, and rain jacket, and white coat, and disposing of the white coat, gloves, and glove liners. I spent approximately 20 minutes walking to my locker, taking off

the remaining gear and storing gear in my locker. It took approximately 5 minutes to walk from my locker to building exit.

It took me approximately 5 minutes less between punch out and leaving the building when I worked on second shift, because I did not have to wear rubber jacket, pants, or boots.

Interrogatory No. 17: *From December 11, 1997 to the present, state specifically by date and amount of minutes and/or hours each date, all uncompensated time spent visiting the medical office for which you claim you were entitled to be compensated.*

Answer to Interrogatory No. 17: None.

[Page 6] I declare under penalty of perjury that the foregoing is true and correct.

Dated: 11/3, 2001

_____
Kenneth LaMarche.

**Handwriting omitted.*

(6)

No. 04-66

Supreme Court, U.S.
FILED
MAY 16 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

Abdela Tum, *et al.*,
Petitioners,

v.

Barber Foods, Inc., d/b/a Barber Foods,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

This Court has held that employees are entitled to compensation under the Fair Labor Standards Act, as amended by the Portal-to-Portal Act, for the time their employer requires them to spend donning and doffing health and safety equipment.

The Questions Presented are:

1. Are employees entitled to compensation for the time they must spend *walking* to and from required health and safety equipment distribution stations?

2. Are employees entitled to compensation for time they must spend *waiting* to receive equipment at required health and safety equipment distribution stations?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the following parties appeared below and are petitioners here: Nicholas Bearce, Allison Carey, Celso Florendo, Letecheal Hailu, Robert Huntley, Ken LeMarche, Ernest Levesque, Natalie Luongo, Paul Mason, Derso Mekonen, The Ngo, Tadeusz Olsyzynski, Joseph Raymond, Doug Robito, Najib Sayed, Laurie Secord, Kevin Snow, Evelyn Theunissen, Heido Wallace, and Mintwab Yimam.

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BRIEF FOR THE PETITIONERS

Petitioners Abdela Tum et al. respectfully request that this Court reverse the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit on rehearing (Pet. App. 1a-19a) is reported at 360 F.3d 274. The report and recommendation of the magistrate judge (Pet. App. 20a-48a), dated January 23, 2002, is unpublished. The district court's order adopting this report and recommendation (*id.* 49a-50a) is unpublished.

JURISDICTION

The court of appeals entered its judgment on March 10, 2004. This Court granted certiorari on February 22, 2005. 125 S. Ct. 1295. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The Appendix to this Brief reproduces the relevant provisions of the Fair Labor Standards Act, as amended by the Portal-to-Portal Act, and implementing regulations of the Department of Labor.

STATEMENT

Employees in many diverse industries must wear specialized clothing and equipment to perform their jobs. The requirement may be imposed by government regulation or by employer policy. In either event, the purpose of the requirement is to fulfill the employer's obligations to conduct its operations safely and to produce safe products. Whether the worker is wearing fire protection gear near a blast furnace, a clean suit in a semiconductor factory, or – as in this case – protective gear and sanitation equipment in a food processing plant, donning and doffing of required clothing and equipment can be a time-consuming process.

This Court has held that the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.*, as amended by the Portal-to-Portal Act (Portal Act), 29 U.S.C. 251 *et seq.*, requires employers to compensate their employees for the time it takes to don and later doff the required equipment. *Steiner* v. *Mitchell*, 350 U.S. 247 (1956). Accord Pet. App. 7a. This case arises because the act of changing clothes often amounts to a minority of the time employees must spend in the process of donning and doffing. Workers frequently must walk between different equipment distribution stations and wait in line at each of those stations to obtain the equipment. At the end of their shift, workers must remove and return this equipment, a process that often involves once again walking and waiting in line. The questions presented by this case address whether workers are entitled to compensation for the closely related walking and waiting time inherent in this required donning and doffing process. The court of appeals held that they are not.

A. Statutory and Regulatory Background

1. The Fair Labor Standards Act requires covered employers to pay qualifying employees a minimum hourly wage. 29 U.S.C. 206(a). The Act's "maximum hours" provision further sets a maximum "workweek" of forty hours, beyond which the employer must pay at least time-and-a-half wages. *Id.* § 207(a)(1).

Congress did not define the term "work" or the bounds of the "workweek" in the FLSA. Administrative regulations[1] and the decisions of this Court interpreting the statute, how-

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[1] Shortly after each statute was enacted, interpretative regulations were promulgated for the FLSA and the Portal Act by the Administrator of the Wage and Hour Division of the Department of Labor. See *Steiner* v. *Mitchell*, 350 U.S. 247, 255 & nn.8-9 (1956); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 137-38 (1944). The relevant regulations, which are currently codified at 29 C.F.R. Parts 785 and 790, are reproduced in the Appendix to this Brief.

ever, have long made clear that "work" under the FLSA encompasses those activities that are "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal* v. *Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). Thus, the "workweek ordinarily includes 'all the time during which an employee is necessarily required to be on the employer's premise, on duty or at a prescribed work place,'" 29 C.F.R. 785.7 (citation omitted), with the exception of bona fide breaks during which "an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes," *id.* § 785.16(a). Of particular relevance here, work under the FLSA specifically includes time spent walking and waiting under the employer's control and direction. See *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 691 (1946) (walking); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 137-38 (1944) (waiting).

2. In 1947, Congress amended the FLSA through passage of the Portal Act. Section 4 of the Portal Act, the provision applicable to this case, presumptively eliminated employers' prospective obligation under federal law to pay compensation for certain classes of activities:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
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> (2) activities which are preliminary to or postliminary to said principal activity or activities * * *,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. 254(a).[2] Thus, the Act renders walking and other preliminary or postliminary activities presumptively non-compensable when they occur outside the workday, defined by the first and last principal activity of the day. Accordingly, Section 4 "did not change" the standard previously set by the FLSA for identifying compensable work, "except to provide an exception for preliminary and postliminary activities." 29 C.F.R. 785.7.

In determining whether Section 4 of the Portal Act applies to particular activities, the threshold question is thus when the workday begins and ends. The Act defines the workday as running between the first and last principal activities of the day. 29 U.S.C. 254(a); 29 C.F.R. 790.6. The term "principal activities" encompasses "all activities which are an integral part of a principal activity," 29 C.F.R. 790.8, including activities such as putting on and taking off clothing and equipment required to perform the basic duties of a job, *Steiner* v. *Mitchell*, 350 U.S. 247, 255-56 (1956). Accordingly, the workday begins with the commencement of the first activity that is "integral and indispensable" to an employee's principal work activities and ends with the completion of the last such activity. Time spent between those events – including activities such as walking and waiting – occur during the workday and therefore by definition fall outside Section 4's exemption from compensation.

B. Procedural History

1. Respondent Barber Foods, Inc. operates a poultry processing plant in Portland, Maine. It runs two daily production shifts, each requiring approximately 150 employees.

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[2] The exemption is only presumptive because time encompassed by the Portal Act's exception is nonetheless compensable when provided by contract or custom. 29 U.S.C. 254(b).

Petitioners are current and former hourly-wage employees at respondent's plant.[3] Pursuant to federal health and safety regulations and company policy, respondent requires its employees to don protective equipment before beginning their activities on the production floor. See Pet. App. 7a. All employees at the plant must, at a minimum, wear lab coats, hair nets, earplugs, and safety glasses. In addition, depending on their jobs, respondent may also require employees to wear vinyl gloves, hard hats, back belts, steel-toed boots, steel mesh gloves, and other equipment. *Id.* 3a.

Respondent alone controls the distribution of this required equipment, which is dispensed at distribution stations that respondent has dispersed at various points throughout its plant. Under respondent's distribution process, employees must spend considerable time collecting, donning, and doffing this equipment. On a typical day, employee begin by waiting in line at equipment "cages" to receive some of their required work gear. They must then proceed to another area to wait in line to retrieve required lab coats from racks along a narrow hallway. Petitioners must then continue through this often crowded hallway – sometimes donning pieces of their gear as they walk – to tubs containing still more equipment. After retrieving additional equipment from the tubs, petitioners generally must proceed to the locker room to retrieve gear, such as hard hats and boots, maintained in their personal lockers. They must then don that gear and then walk up a stairway to stand in line to clock in at the entrance to the factory floor.

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[3] This case involves four classes of employees: (1) rotating associates who work on the production lines that create finished products; (2) set-up operators who maintain the machinery; (3) meatroom associates who blend the raw meat with other ingredients; and (4) shipping and receiving associates who ship the finished products. Pet. App. 2a. Claims originally brought on behalf of maintenance and sanitation workers are no longer a part of the case.

Pet. App. 23a-28a.[4] At the end of their shifts, respondent requires employees to reverse the process, removing all of their required equipment and returning it to the cage and various designated lockers, laundry bins, and trash cans. *Ibid.*

On average, the donning and doffing process mandated by respondent takes each of its employees approximately twenty minutes to complete every working day, or more than an hour and a half per week.[5] However, during the period relevant to this suit, respondent refused to pay them for any of this time. Instead, petitioners were only paid from the time that they punched in at a time clock located at the entrance to the production floor, which they could enter only after having fully donned the required gear. Pet. App. 4a, 23a, 25a. Similarly, because petitioners were required to punch out before removing and disposing of the equipment, *id.* 4a, they re-

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[4] The donning and doffing process varies to a degree from employee to employee depending on the type of work performed by each employee. See Pet. App. 22a-25a.

[5] Because the courts below held that the walking and waiting time was non-compensable as a matter of law, neither the trial court nor the jury ever determined how long the process took in its entirety, including the integral walking and waiting time. The testimony at the summary judgment stage, however, indicated that rotating associates took a total of twenty to thirty minutes each day to complete the donning and doffing process. See J.A. 174-76, 178, 214-17, 247-48. Some rotating associates were required to spend an additional six to seven minutes waiting for their supervisor to issue job assignments prior to punching in. *Id.* 177, 183. Set-up operators spent a total of twenty to thirty-five minutes in the donning and doffing process. *Id.* 152-55, 157-58, 161-64, 256-57, 262-63. Meatroom employees spent approximately fifteen minutes on these same activities and, every other day, an additional five to fifteen minutes washing their boots as required by respondent. *Id.* 190, 196-98, 203-04, 154. Finally, shipping and receiving employees spent a total of fifteen to twenty minutes in the donning and doffing process. *Id.* 135-36, 139.

ceived no compensation for the lengthy doffing process either.

2. Petitioners filed this collective action suit alleging, among other things, that respondent's refusal to compensate them for these donning and doffing activities – the actual clothes-changing, as well as the attendant walking and waiting – violated the FLSA.

Adopting a magistrate's recommendation, the district court separately analyzed the walking, waiting, donning and doffing components of petitioners' claims. First, the court granted respondent summary judgment as a matter of law on petitioners' claim for compensation for time they were required to spend walking and waiting. The district court deemed these periods of time "preliminary" and "postliminary" to the workday under the Portal Act and, therefore, not compensable. Pet. App. 33a-34a.

Second, the district court denied respondent summary judgment with respect to the time petitioners spent specifically in the act of clothes-changing. It reasoned that this activity was not "preliminary" or "postliminary," Pet. App. 40a, but rather was "an integral part of the [petitioners'] work for [respondent]," *id.* 37a.

The case then proceeded to trial. The jury was presented with the question whether respondent was required to compensate petitioners for the time that they spent actually putting the equipment on and, later, taking it off. Respondent argued that it was not required to pay even for this time because it was "*de minimis*." Permitted only to consider this time in isolation from the related walking and waiting time, the jury deemed it to be *de minimis* and therefore not compensable. The district court accordingly entered judgment in favor of respondent on all of petitioners' claims. J.A. 8-9.

3. The First Circuit affirmed.[6] The court of appeals agreed with the district court and petitioners that the donning and doffing of mandatory safety equipment is compensable work under the FLSA and the Portal Act. It explained that this conclusion followed from this Court's decision in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), which held that donning required work clothes at a car battery plant was compensable because it was an "integral part of and indispensable to [employees'] principal activities" at the plant, *id.* at 254. See Pet. App. 7a.

The court of appeals also agreed with the district court that the walking and waiting components of petitioners' donning and doffing activity were non-compensable under the Portal Act, rejecting petitioners' two arguments for reversal. Pet. App. 8a-12a.

First, petitioners contended that these activities occurred during the workday, and therefore fell outside the scope of Section 4, because the donning and doffing process delineated the boundaries of their workday. The court of appeals held, however, that an "integral and indispensable" activity like the donning and doffing of safety gear could not begin and end the workday. Petitioners' contrary view, the court of appeals opined, would constitute an unwarranted "expansion of the ordinary 'workday,'" lead to absurd results, and undermine the purposes of the Portal Act. Pet. App. 9a-10a. The court acknowledged that its construction of the statute conflicted with the Secretary of Labor's interpretation of the Act and the Department's regulations, as expressed in the *amicus* brief that he filed on petitioners' behalf. *Id.* 10a. But the court concluded that the Secretary's interpretation "pushes so far that it threatens to undermine the Portal-to-Portal Act." *Ibid.*

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[6] The First Circuit issued two opinions. After initially affirming, see 331 F.3d 1 (2003), the panel granted petitioners' petition for rehearing, which was supported by the Department of Labor as *amicus curiae*, and withdrew its initial opinion. The panel subsequently issued a second opinion, again affirming. Pet. App. 1a-19a.

Second, and alternatively, petitioners argued that the waiting time inherent in the donning and doffing process was compensable as an "integral and indispensable" part of their principal activities. The court of appeals disagreed. It construed the Department of Labor's implementing regulations – contrary to the Department's own interpretation of those regulations – to provide that this "waiting time is intended to be preliminary or postliminary." Pet. App. 12a.

Accordingly, under the court of appeals' decision, petitioners were entitled to compensation only for the amount of time spent in the act of putting on and taking off the required equipment. However, because that time, standing alone, had been found *de minimis*, see Pet. App. 5a, petitioners were denied all compensation for the entire donning and doffing process.

One judge separately concurred to suggest an alternative interpretation of the Portal Act that would "treat required donning and doffing as compensable when more than *de minimis* but, where it is not, [would] leav[e] both it and any associated walking and waiting time as non-compensable." Pet. App. 18a. He noted, however, that neither this suggestion nor the Secretary's contrary position was "impossible analytically and neither is clearly dictated by Supreme Court precedent or underlying policy." *Id.* 19a.

4. Petitioners filed a petition for writ of certiorari on July 8, 2004. This Court granted the petition in part on February 22, 2005, consolidating the case for argument with No. 03-1238, *IBP* v. *Alvarez*.

SUMMARY OF THE ARGUMENT

Every morning, respondent requires its employees to arrive early at work and begin the lengthy process of acquiring and donning various pieces of equipment before they proceed to the factory floor. At the end of the day, respondent requires its employees to reverse the process. There is no dispute that the employees spend this time at respondent's direction and for respondent's benefit. There is accordingly no

question that the time spent qualifies as "work" within the ordinary meaning of the Fair Labor Standards Act. The only question is whether the Portal Act obviates respondent's obligation to pay petitioners for this work. It does not.

1. The Portal Act was passed in response to this Court's decision in *Anderson* v. *Mount Clemens Pottery Co.*, 328 U.S. 680 (1946), which held that – contrary to both the expectations of most employers at the time and the collective bargaining contracts in many industries – the time employees spent traveling from the factory gate to their work benches and time spent in other preliminary activities were compensable time under the FLSA. Congress responded to the ensuing flood of "portal-to-portal" litigation by enacting in the Portal Act two different rules, one for cases arising before the passage of the Act, and another to govern compensation in the future. The provision governing pre-existing cases (Section 2) pervasively relieved employers of liability for any unpaid wages unless the activity in question was made compensable by contract or custom, regardless of when during the day that activity occurred. See 29 U.S.C. 252. The provision governing future cases such as this one (Section 4) was substantially more limited and more favorable to employees. Section 4 does not limit in any respect employees' right to compensation for activities that occur during the workday, defined by the first and last principal activity of the day. See 29 U.S.C. 254.

The walking and waiting time in this case occurs during the workday and, accordingly, the Portal Act has no application. In *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), this Court held that changing in and out of required work clothes was compensable under the Portal Act because it is an "integral part of and indispensable to [employees'] principal activities." *Id.* at 254. Under this precedent, donning and doffing constitute part of petitioners' principal activities. And because they are the first and last principal activities of the day, the donning and doffing process marks the boundaries of petitioners' workday. The walking and waiting that occur after the don-

ning commences, and before the doffing is complete, therefore occur during the workday and are outside of the scope of Section 4's exemption from compensation.

The First Circuit concluded that activities like donning and doffing, while compensable under *Steiner*, nonetheless do not constitute part of petitioners' "principal activities" and, consequently, cannot delineate the boundaries of the workday. That holding was erroneous. Consistent with the statute, regulations, and legislative history, *Steiner* held that donning and doffing are compensable notwithstanding the Portal Act precisely because they constitute "part of" the employees' "principal activities," 350 U.S. at 254, not because the Court determined to create an extra-textual exception to Section 4 for activities that are "integral and indispensable" activities but are not quite principal activities themselves.

Nor is there any basis to believe that Congress intended to render walking or waiting generally non-compensable regardless of when they occur during the day. While Section 4(a)(1) mentions walking to a place of the performance of a principal activity, the Act denies compensation for such walking only if it occurs "prior to" or "subsequent to" petitioners' principal activities. 29 U.S.C. 254(a). Accordingly, the Act does preclude compensation for petitioners' walk from the factory gate to the donning area, but it does not apply to walking during the workday. Were the statute read otherwise, employees' right to compensation would start and stop repeatedly through the workday as, for example, they walked from one chicken processing station to the next, or from the factory floor to a knife-sharpening station and back. That result not only would be unadministrable, but it would also conflict with the well-settled "continuous workday" rule, under which employees are entitled to compensation for all hours spent during the workday except during bona fide breaks. Congress limited Section 4 to activities outside of the workday for the specific purpose of maintaining that rule of compensation.

The court of appeals wrongly believed that its broad construction of the Portal Act – and its narrow reading of employees' right to compensation – was necessary to avoid absurd results and to preserve the intended scope of the Act's provisions. Contrary to the court of appeals' fears, there is no risk that petitioners' interpretation would give workers the power to extend the workday by donning and doffing their safety equipment whenever they please. To the contrary, respondent can control the length of the work day simply by directing when and where petitioners don and doff their equipment. Moreover, respondent can limit its donning and doffing costs by improving the efficiency of its equipment distribution system. At the same time, petitioners' interpretation preserves the intended scope of the Portal Act. Nothing in petitioners' argument requires respondent to pay employees for ordinary commuting time, the walk from the factory gate to the donning area, ordinary clothes-changing, or any of the other truly preliminary and postliminary activities that Congress intended to address in Section 4.

2. In any event, even if the walking and waiting in this case occurred outside the workday proper, they would still be compensable as part and parcel of the principal activities of donning and doffing required safety equipment. As the First Circuit recognized, *Steiner* established that the Portal Act does not deny compensation for activities that are an "integral part of and indispensable to [employees'] principal activities." 350 U.S. at 254. The First Circuit also recognized that, under *Steiner*, donning and doffing of required equipment constitutes such compensable activities. The court wrongly concluded, however, that *Steiner*'s holding did not extend to walking and waiting that are inextricable from the donning and doffing process.

The clothes-changing and showering activities found compensable in *Steiner* clearly entailed walking and waiting as employees were given work clothes, changed into them in locker rooms, changed out of them at the end of the day, dropped them off for laundering by the employer, and pro-

ceeded to take showers. 350 U.S. at 251. In both this case and *Steiner*, the integral walking and waiting during the donning and doffing process cannot sensibly be distinguished from the clothes-changing itself. Petitioners undertake the walking and waiting solely in order to complete the required donning and doffing that are under the control, and for the benefit, of respondent. They are just as much a part of petitioners' work as are putting on and taking off the equipment.

3. There is no basis for accepting the alternative theory proposed by the concurrence below that would render walking and waiting time non-compensable if the actual donning and doffing of the required equipment, considered in isolation, took a *de minimis* amount of time. That theory was not the basis of the decision below and, in any event, the time at issue in this case is not *de minimis* under any proper legal standard. Moreover, the suggestion of the concurrence is inconsistent with the text and purposes of the Portal Act. There is no durational qualifier for "principal activities" under the Act. In fact, Congress understood that many workers begin their days with a series of short preparatory activities that, if considered in isolation, could be seen as *de minimis*. Importing a *de minimis* test into the determination of when the workday starts and ends would add an element of unfairness and uncertainty into the Act that would inevitably result in confusion, labor conflict, and increased litigation.

ARGUMENT

The First Circuit's decision in this case fundamentally misconstrues the Portal-to-Portal Act. Respondent requires petitioners to engage in a lengthy process of donning and doffing health and safety equipment in order to comply with respondent's legal obligations and to protect the quality of its food products. It is uncontestable that all of this time – which petitioners spend entirely at the direction of respondent – is compensable work under the Fair Labor Standards Act. Nor is that time exempted from compensation by the Portal Act, for two independent reasons. First, the donning and doffing

process occurs during the workday, which begins when employees stand in line to receive their first piece of required equipment and ends when they remove the last piece of equipment. Second, the walking and waiting time is an integral part of the donning and doffing process, an activity this Court has previously held to be compensable because it is not covered by the Portal Act.

I. The Walking And Waiting Time At Issue In This Case Is Compensable "Work" Under The FLSA.

As a threshold matter, the time petitioners spend walking and waiting during the donning and doffing process is subject to the minimum wage and overtime requirements of the FLSA because it constitutes compensable work within the meaning of that statute. Congress enacted the FLSA in 1938 to address "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. 202(a). The Act "was designed to ensure that each employee covered by the Act would receive '[a] fair day's pay for a fair day's work' and would be protected from 'the evil of overwork as well as underpay.'" *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (emphasis omitted) (quoting message of President Roosevelt at signing of the FLSA).

The FLSA did not define the "work" for which the hourly minimum wage was due or identify the boundaries of the compensable workday. Litigation regarding the compensability of activities occurring at the margin of the workday began to reach this Court in the mid-1940s. In *Tennessee Coal* v. *Muscoda Local No. 123*, 321 U.S. 590 (1944), for example, the Court held that the FLSA required employers to compensate employees for time spent traveling between the surface and the working "face" of an iron ore mine, rejecting the view that the FLSA left the definition of work to be resolved by contract. *Id.* at 602. Instead, the Court gave the statutory term "work" its ordinary, dictionary meaning as in-

cluding all "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Id.* at 598.

There is no serious dispute that the activities at issue in this case constitute compensable "work" under the FLSA. Respondent and other similarly situated employers require employees to don and doff the health and safety equipment. See Pet. App. 6a-7a; *Alvarez* v. *IBP, Inc.*, 339 F.3d 894, 902 (CA9 2003). Respondent furthermore specifies the means by which the employees must acquire that equipment on respondent's premises. The process designed by respondent requires employees to wait for significant amounts of time to receive the equipment and to travel between multiple distribution stations. Throughout this donning and doffing process, employees are under the control of respondent. The activity is accordingly "work" compensable under the terms of the FLSA. See, *e.g.*, *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 691 (1946) (walking time constituted work when "[s]uch time was under the complete control of the employer, being dependent solely upon the physical arrangements which the employer made in the factory"); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 136 (1944) ("[N]o principle of law found either in the statute or in Court decisions precludes waiting time from also being work time."); *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944) (waiting time constitutes work when "spent predominantly for the employer's benefit").

The only remaining question, therefore, is whether Congress withdrew the right to compensation for this time when it enacted the Portal Act. It did not.

II. The Court of Appeals Erred In Its Determination That The Donning And Doffing Process Does Not Start And End The Workday.

When applicable, Section 4 of the Portal Act excuses an employer from paying the minimum wages or overtime pay otherwise required by the FLSA for an activity unless the ac-

tivity is made "compensable by either * * * an express provision of a written or nonwritten contract" or by "a custom or practice." 29 U.S.C. 254(b)(1)-(2). Section 4 only applies, however, to certain activities that occur at certain times of the day. The provision applies only to "(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" and "(2) activities which are preliminary to or postliminary to said principal activity or activities." 29 U.S.C. 254(a)(1)-(2). Most important for present purposes, Section 4 only applies to these activities when they occur *outside the workday*. That is, Section 4 applies only to activities that occur "either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." *Id.* § 254(a).

Section 4's restriction to activities occurring outside the workday is a critical and intentional limitation on the statute's scope. As the Senate Report explains, Section 4 was drafted to ensure that "activities of an employee which take place during the workday" were "*not affected* by this section and such activities will continue to be compensable or not without regard to the provisions of this section." S. Rep. No. 80-48, at 47 (1947) (emphasis added). Thus, "[a]ny activity occurring during a workday will continue to be compensable or not compensable in accordance with the existing provisions of the Fair Labor Standards Act." *Id.* at 48.[7]

The administrative regulations interpreting the Portal Act likewise provide that the Act "does not affect the computation of hours worked within the 'workday' proper * * * and its provisions have *nothing to do* with the compensability under the [FLSA] of any activities engaged in by an employee during that period." 29 C.F.R. 790.6(a) (emphasis added); see

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[7] The Senate Report is particularly significant because Section 4 originated as a Senate proposal. See *Steiner* v. *Mitchell*, 350 U.S. 247, 272-73 (1956).

also *id.* § 790.7 ("[T]he criteria described in the Portal Act have no bearing on the compensability or status as worktime under the Fair Labor Standards Act of activities that are not 'preliminary' or 'postliminary' activities outside the workday."). Thus, the regulations provide that the Portal Act applies only to activities that "take place before or after the performance of all the employee's 'principal activities' in the workday." *Id.* § 790.4(b). These regulations were promulgated shortly after the Portal Act was enacted and provide "informed conclusions as to the meaning of the law" to be used by the Department of Labor "to carry out [its] statutory duties of administration and enforcement." *Id.* § 790.1(c).[8] Even under ordinary circumstances, such regulations are due deference as "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944) . However, the deference due here is heightened considerably because, as this Court observed in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), Congress expressly approved the regulatory interpretation of the Portal Act when it amended the statute in 1949 "after hearing from the Administrator his outstanding interpretation of the coverage of certain preparatory activities." *Id.* at 255 (citing Pub. L. No. 81-393, § 16(c), 63 Stat. 911, 920 (1949)).

While the First Circuit agreed that Section 4 does not apply to activities during the "workday," it rejected petitioners' claims because it concluded that the donning and doffing process falls outside the scope of the workday contemplated by the Portal Act. Pet. App. 9a-10a. That construction of the workday, however, fundamentally misconstrues the statute.

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[8] The Department of Labor is authorized to enforce the FLSA through civil actions for unpaid wages, liquidated damages, civil penalties, and injunctive relief. 29 U.S.C. 216(c), (e); *id.* § 217.

A. The Workday Is Bounded By The Donning And Doffing Process, And Includes Related Walking And Waiting.

Under the Portal Act, an employee's workday is bounded by the employee's first and last "principal activities." See 29 U.S.C. 254(a); S. Rep. No. 80-48, at 48 (1947) ("[T]he particular time at which the employee commences his principal activity or activities and ceases his principal activity or activities mark[s] the beginning and the end of his workday."). "Periods of time between the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted." 29 C.F.R. 790.6(a). In this case, petitioners' first and last "principal activities" are the process of first donning and later doffing required health and safety equipment. That process includes the time petitioners are required to wait for equipment and walk between distribution stations.

This Court's decision in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), established that donning and doffing required by an employer constitute principal activities under the Portal Act. The employees in *Steiner* manufactured car batteries and spent approximately thirty minutes per day changing in and out of work clothes provided by the employer and showering at the end of the day. *Id.* at 251. The employer refused to compensate the workers for this time, contending that the changing and showering "activities fall without the concept of 'principal activity.'" *Ibid.* The term "principal activity," the employer argued, was limited to the employee's core productive duties on the assembly line, in contrast to preparatory activities such as donning and doffing clothing. *Id.* at 251-52.

This Court squarely rejected that construction of the Portal Act. The Court concluded that the term "principal activities" includes activities that "are an integral part of and indispensable to [employees'] principal activities." 350 U.S. at 255. The Court observed that this definition was consistent

with both the legislative history and the administrative regulations adopted by the Department of Labor. *Id.* at 255 & n.9 (citing 29 C.F.R. 790.8). Under this definition of a "principal activity," the Court had no difficulty in concluding that the workers' claims did not fall within Section 4's exemption from compensation. 350 U.S. at 256. "[I]t would be difficult to conjure up an instance where changing clothes and showering are more clearly an integral and indispensable part of the principal activity of the employment than in the case of these employees." *Ibid.* See also *Mitchell* v. *King Packing Co.*, 350 U.S. 260, 263 (1956) (sharpening knives part of meatpackers' principal activities).

Like the workers in *Steiner*, petitioners begin their workday when they commence the process of donning required safety equipment, their first principal activity of the day.[9] The workday ends when the employees remove their last piece of equipment to complete the doffing process, the final principal activity of the day. All waiting and walking time between these two events – whether waiting in line for the next piece of equipment, walking between the donning and doffing areas and the factory floor, or walking from one part of the plant to another during the shift – falls outside of the scope of the Portal Act because it does not occur "*prior to* the time on any particular workday at which such employee commences, or *subsequent to* the time on any particular workday * * * at which he ceases, such principal activity or activities." 29 U.S.C. 254(a) (emphasis added). Accord *Alvarez* v. *IBP, Inc.*, 339 F.3d 894, 906-07 (CA9 2003).

The First Circuit rejected this conclusion on the ground that it required an untenable "expansion of the ordinary 'workday' rule in favor of a broader, automatic rule that any activity that satisfies the 'integral and indispensable' test itself

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[9] This process begins when petitioners take their place in line to receive the first piece of equipment. See 29 C.F.R. 790.7(h) (waiting for a principal activity to begin is an integral part of the principal activity); see also *infra* 39.

starts the workday, regardless of context." Pet. App. 9a. The court of appeals did not elaborate on its reasoning. But it apparently would distinguish a supposedly "true" principal activity (such as the work on the production floor), which would both be compensable *and* start the workday, from "integral and indispensable" activities (like donning and doffing), which would be compensable but may or may not start the workday, depending on their "context." This view fundamentally misconstrues the Portal Act and this Court's decision in *Steiner*.

Contrary to the apparent view of the First Circuit, there is no distinction between a "principal activity" and an "integral and indispensable activity." There certainly is no logical basis for assigning the donning and doffing of required safety equipment lesser status under the FLSA and the Portal Act. The activities themselves are of considerable importance to the employer in ensuring the quality of its product. In the semiconductor industry, for example, creating high-quality computer chips requires an extraordinary level of cleanliness in the workplace that can only be accomplished if workers go through an extensive "gowning" process that can involve up to a dozen stages of decontamination procedures. See *Ballaris* v. *Wacker*, 370 F.3d 901, 903-04 (CA9 2004). In other industries, the donning and doffing of safety gear are vital to permit workers to perform their duties in dangerous environments, such as those near a blast furnace or in a toxic chemical plant, where work otherwise simply could not be performed at an acceptable risk to human life. Frequently, the activity is necessary to reduce the incidence of, and the employer's financial exposure for, serious workplace injuries. In the parallel *Alvarez* case, for example, employees who process slaughtered cattle wear chain-link metal aprons, plexiglass arm guards and Kevlar gloves to protect themselves from serious injury from the extremely sharp knives and saws they must use to perform their jobs. 339 F.3d at 898 n.2. There is no basis for concluding that donning and doffing such equipment are any less a part of the worker's principal activities

than the time spent etching the semiconductors, tending the blast furnace, or carving the beef.

Certainly nothing in *Steiner* supports such a distinction. This Court's reference in *Steiner* to "integral and indispensable" activities was simply an interpretation of the statutory phrase "principal activity or activities." Under the plain text of the Portal Act, the workers in *Steiner* could recover only if their clothes-changing activities did not occur "prior to" or "subsequent to" their "principal activity or activities." 29 U.S.C. 254(a). Adhering to the statutory language, this Court found the donning and doffing compensable because it concluded that "principal activities" include those that are "an integral and indispensable *part of* the principal activities for which covered workmen are employed." 350 U.S. at 248 (emphasis added). Nothing in the opinion suggests that this Court intended to create an additional extra-textual exception to Section 4 for activities that were related to – but not in and of themselves – principal activities.

The Department of Labor's regulations likewise make clear that the Act draws no distinction between "principal activities" and "integral and indispensable" activities. "The term 'principal activities,'" the regulations explain, "includes all activities which are an integral part of a principal activity." 29 C.F.R. 790.8. Thus, for example, the regulations provide that travel is compensable as part of a day's work when it is preceded by activities such as "report[ing] to a meeting place to receive instructions * * * or to pick up tools." *Id.* § 785.38.[10] Under the First Circuit's rule, by contrast, such

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[10] Although the regulations defining "hours worked" in Part 785 of Title 29 of the Code of Federal Regulations were promulgated more recently than the original Portal Act regulations in Part 790, and were not among those regulations ratified by the 1949 Act described in *Steiner*, 350 U.S. at 255, the "hours worked" regulations nonetheless are consistent with the Portal Act regulations and provide further guidance on the agency's interpretation of that Act. See *Skidmore*, 323 U.S. at 140.

"integral and indispensable" activities would not have begun the workday, even though the time spent at the meeting or collecting the tools was compensable under *Steiner*.

The relevant legislative history also provides that "[t]he term 'principal activity or activities' *includes* all activities which are an integral *part* thereof." S. Rep. No. 80-48, at 48 (1947) (emphasis added). Senator Cooper, a sponsor of the bill, further explained on the Senate floor "that those activities which are so closely related and are an integral part of the principal activity, indispensable to its performance, *must be included in the concept* of principal activity." 93 Cong. Rec. 2297 (1947) (emphasis added). The Senator explained that the term is "sufficiently broad to *embrace within its terms* such activities as are indispensable to the performance of productive work." *Id.* at 2299 (emphasis added).

B. The First Circuit's Decision Is Contrary To The Continuous Workday Principle Embodied By The Portal Act.

The error of the court of appeals' construction of the Portal Act is further illustrated by the conflict between the decision below and the "continuous workday rule," a settled principle of compensation that Congress intended to codify in the Portal Act. Under that rule, a worker's compensable time runs uninterrupted throughout the workday, with the sole exception of bona fide breaks. See 29 C.F.R. 785.7, 785.16(a). The First Circuit's decision, however, provides that employees' entitlement to compensation starts and stops during the workday. That result not only conflicts with the terms of the continuous workday rule but also creates precisely the administrative problems and the potential for unfairness that the rule was intended to eliminate.

1. Congress enacted the Portal Act against the backdrop of a well-established administrative interpretation of the FLSA providing that an employee's "hours worked" "will include in the ordinary case all hours from the beginning of the workday to the end with the exception of periods when

the employee is relieved of all duties." Administrator Wage and Hour Division, Interpretive Bulletin 13, *reproduced in relevant part infra*, App., at 31a. This interpretation, first adopted in 1939 soon after the FLSA was enacted, implemented Congress's determination to ensure a fair day's pay for a fair day's work while also avoiding the practical difficulty and potential for abuse inherent in subjecting every minute of the workday to a separate determination of compensability.

In the Portal Act, Congress limited Section 4's exemption from compensation to activities occurring *outside* the workday precisely in order to ensure that the continuous workday rule would apply to activities occurring during the workday. Thus, the Senate report stated that "[a]ny activity occurring during a workday will continue to be compensable or not compensable in accordance with the existing provisions of the Fair Labor Standards Act." S. Rep. No. 80-48, at 48 (1947). Senator Cooper explained that Congress intended to ensure that the "rules which have been already developed by the Wage and Hour Administrator and the decisions of the courts still apply to that interval between the commencement of the employee's principal activity and the end thereof." 93 Cong. Rec. 2297 (1947); see also *id.* at 2299 ("[T]his is the first legislation which confirms the interpretations which have been given by the Wage and Hour Administrator prior to this date."). Congress specifically recognized that one of those rules was the continuous workday principle. See S. Rep. 80-48, at 8 (quoting Bulletin 13).

Consistent with this congressional design, the Department of Labor's current regulations continue to recognize that the Portal Act does not apply to interrupt the continuous workday. Thus, the regulations provide that the "workweek ordinarily includes 'all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place,'" 29 C.F.R. 785.7 (citation omitted), with the exception of bona fide breaks during which "an employee is completely relieved from duty and which are

long enough to enable him to use the time effectively for his own purposes," *id.* § 785.16(a). In addition, the regulations specifically state that "Section 4 of the Portal Act does not affect the computation of hours worked within the 'workday' proper." *Id.* § 790.6(a); see also *id.* § 790.7(a).

2. The First Circuit's decision cannot be reconciled with the continuous workday rule because it interprets the Portal Act to create a markedly *discontinuous* workday. The court of appeals acknowledged that the acts of actually donning and doffing required equipment were compensable under the FLSA. Pet. App. 7a. But it held that the employees' compensable time ceases during intervening periods of walking and waiting. *Id.* 10a, 12a. On the First Circuit's construction, the compensable workday starts and stops repeatedly throughout the morning and afternoon as employees wait at each of the several donning and doffing stations and travel between these stations and the production floor.[11] Compensable time under the First Circuit's rule is difficult to record, or even to estimate. And, perhaps most significantly, the rule fails to account for the practical reality that all of the time spent during this process is under the direction and control, and for the benefit, of the employer. "There is nothing in the statute or regulations that would lead to the conclusion

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[11] To be sure, under the court of appeals' decision, petitioners' own particular workday was not discontinuous, given that petitioners were deprived of any compensation for the entire donning and doffing process. But that continuity exists here only because the jury found that the actual donning and doffing took a *de minimis* amount of time in this particular case. That *de minimis* inquiry was fundamentally flawed, see Part III(B), *infra*, but even if it were not, the general legal principle proposed by the First Circuit would result in a discontinuous workday in many other cases in which the donning and doffing were not themselves *de minimis*. On the facts of the *Alvarez* case, for example, the First Circuit's rule would repeatedly start and stop the workday. See *Alvarez*, 339 F.3d at 904 (donning and doffing of individualized safety gear there not *de minimis*).

that a workday may be commenced, then stopped while the employee is walking to his station, then recommenced when the walking is done." *Alvarez* v. *IBP, Inc.*, 339 F.3d 894, 907 (CA9 2003).

The same practical and equitable problems would arise in any number of other industries and professions in which the workday begins with a preparatory activity that does not meet the First Circuit's conception of a "true" principal activity. Take, for example, the workday of a prison guard who must arrive at work at 7 a.m., wait in line to receive his keys, radio and other equipment, and then walk to a meeting room for the morning briefing at 7:20. The briefing is scheduled to permit sufficient time for a thirty-minute discussion prior to the start of the shift at 8 a.m., but frequently lasts only ten minutes. Once the briefing is completed, the guard must walk ten minutes to his station and wait up to twenty minutes for his shift to start if the morning briefing was short. Under the First Circuit's view, the guard's workday does not begin until 8 a.m. when he began his "primary activity," Pet. App. 12a, an hour after he started his first compensable activity of the day. During that one-hour interval, the clock turned off and on repeatedly, but the guard accumulated only a few minutes worth of pay (and perhaps none, given the court's application of the *de minimis* rule, see Part IV(B)(1), *infra*). Yet Congress could not have intended that result, for the guard is constantly acting under the direction and for the benefit of the prison in the midst of the workday.

This scenario is common. Construction workers often are required to report to the company's headquarters to collect, prepare, and stow their tools for transport to the job site. *E.g.*, *Ladegaard* v. *Hard Rock Concrete Cutters, Inc.*, 2004 U.S. Dist. LEXIS 16288 (N.D. Ill. Aug. 17, 2004). Plumbing contractors report to their main offices to pick up work orders and supplies before proceeding to appointments. *E.g.*, *Dole* v. *Enduro Plumbing, Inc.*, 1990 U.S. Dist. LEXIS 20135 (D. Cal. 1990). Truck drivers fuel their vehicles or wait while their trailers are loaded before heading out to deliver their

loads. *E.g.*, *Mitchell* v. *Mitchell Truck Line, Inc.*, 286 F.2d 721 (CA5 1961). In these and other industries, employees' preparatory activities are "integral and indispensable" to their principal activities, but are not the type of "primary activities" the court of appeals considered necessary to commence the workday. Pet. App. 12a.

There is no reason to conclude that Congress intended the Portal Act to deprive these workers of compensation for what is obviously substantial work for the benefit of their employers. The Portal Act was intended to remove unfair liability for businesses, not to create an inequitable windfall for employers.

C. The Court Of Appeals Fundamentally Misunderstood The Portal Act's Exclusion From Compensation For Walking And Waiting Time.

1. The court of appeals also erred in suggesting (see Pet. App. 12a) that the Portal Act's specific reference to "walking" in Section 4(a)(1), and the Act's broader purposes in general, justified the conclusion that "a reasonable amount" of walking and waiting "is intended to be preliminary or postliminary," regardless of when it occurs during the workday. See also *Alvarez* Pet. for Cert. 13, 17 (same). "Preliminary" activities are those that, in fact, precede *in time* the first principal activity of the day. See 29 U.S.C. 254(a) (describing acts "*prior to the time* on any particular workday at which such employee commences * * * such principal activity or activities" (emphasis added)). Walking and waiting that occur *after* or *during* a principal activity are not *preliminary* if the words "preliminary" and "prior to" are to be given a reasonable construction.

Thus, although Section 4 of the Portal Act lists "walking" as an activity that may in some instances be presumptively exempt from compensation, the statute by its terms applies only to walking that "occur[s] either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he

ceases, such principal activity or activities." 29 U.S.C. 254(a). See Part II(A), *supra*. Because the walking at issue in this case occurs during, or after, the "commencement" of the principal activity of donning, it is not preliminary. See 29 C.F.R. 790.6(a); *Alvarez* v. *IBP, Inc.*, 339 F.3d 894, 906-07 (CA9 2003) (Section 4(a)(1) of the Portal Act is not a "'stand alone' provision excluding from compensability any and all 'walking, riding, or traveling to and from the actual place of performance of the principal activity' without regard for the 'principal activity' itself").

Section 4(a)(1)'s reference to walking to a place of principal activity reflects Congress's effort to make absolutely clear that it did not intend for the term "principal activity" to include the initial walk from the factory gate to the place of the first principal activity of the day, lest a court conclude that the initial walk was an "integral and indispensable" part of that principal activity. See *Steiner* v. *Mitchell*, 350 U.S. 247, 255, 256 (1956) (noting that the "integral and indispensable" interpretation of "principal activity" does not extend to activities "specifically excluded by Section 4(a)(1)").[12] But Congress did not exempt from compensation all walks to places where principal activities are performed regardless of when the walking occurs. Were the statute so read, every time an employee walked from one principal activity to another – for example, from one chicken processing station to the next,

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[12] The list of activities in Section 4(a)(1)-(2) was added after the bill was revised to define the workday in terms of the employees' "principal activities" rather than in accordance with the terms of the employment contract. Compare S. Rep. No. 80-37, at 44, 47-48 (1947) with S. Rep. No. 80-48, at 48 (1947). That change in definition, with the accompanying intent to define "principal activity" to include "all activities which are an integral part thereof," S. Rep. No. 80-48, at 48, gave rise to the possibility that a court might erroneously deem the initial walk to the place of the first principal activity to be integral to that principal activity and, therefore, compensable. Subsection 4(a)(1) eliminated that risk.

from the factory floor to the knife-sharpening area, or from one construction site to another – the clock would stop and start. This is clearly not what Congress intended. See 29 C.F.R. 790.7(c) (the "'walking, riding or traveling' to which section 4(a) refers" does not include "travel from the place of performance of one principal activity to the place of performance of another").

The same analysis applies to the question whether the Portal Act renders *waiting* time presumptively exempt from compensation – it depends on when the waiting occurs. Section 4 exempts from compensation waiting prior to the commencement of an employee's principal activities. See, *e.g.*, 29 C.F.R. 790.7(h) (waiting by an employee who voluntarily arrived at work prior to required starting time is preliminary). By contrast, waiting that occurs during or between the first and principal activities of the day is outside the scope of the Portal Act. See, *e.g.*, *id.* § 785.15 (providing that "a factory worker who talks to his fellow employees while waiting for machinery to be repaired" is engaged in compensable work); *id.* § 790.7(h) (employees required to arrive at worksite at a particular time are entitled to compensation for time spent waiting for first principal activity to begin).[13]

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[13] The court of appeals' disregard for the temporal limitations of the Portal Act is starkly illustrated in its treatment of the time spent waiting to clock in. Respondent has positioned its time clocks so that petitioners must first don their equipment, then wait to punch in before entering the factory floor. Pet. App. 4a. Thus, the clocking-in process occurs after the first principal activity of the day. The court of appeals nonetheless concluded that waiting to clock in is always a "preliminary" activity under the regulations, regardless of when it occurs. *Id.* 11a. But the regulations make clear that time spent clocking in and out is among a number of "activities which *may* be performed *outside the workday* and, *when performed under the conditions normally present*, would be considered 'preliminary' or 'postliminary.'" 29 C.F.R. 790.7(g) (emphasis added). Of course, respondent may avoid having to pay for time

2. Disregarding the temporal limitations of the Portal Act ignores not only the plain language of the statute, but also the important congressional compromise that language embodies. Congress enacted the Portal Act in response to this Court's holding in *Anderson* v. *Mount Clemens Pottery Co.*, 328 U.S. 680 (1946), that the FLSA required employees to be compensated for time spent walking from a plant entrance to the factory floor, as well as other preliminary activities. See *id.* at 691-92. "Work of that character," the Court held, "must be included in the statutory workweek and compensated accordingly, regardless of contrary custom or contract." *Id.* at 692.

The decision in *Mount Clemens* prompted a wave of litigation. See, *e.g.*, S. Rep. No. 80-48, at 1-5 (1947). Numerous suits were instituted seeking recovery for past wages and liquidated damages for time that had previously been deemed not compensable by custom or contract. See, *e.g.*, H.R. Rep. No. 80-71, at 4 (1947). Congress responded by passing the Portal Act.

Congress's principal reaction to *Mount Clemens* was to limit substantially the *retrospective* liability imposed by this Court's ruling – *i.e.*, it addressed the claims that were filed in the wake of *Mount Clemens* and prior to the Portal Act's adoption. As this Court explained in *Steiner*, "The Portal-to-Portal Act was designed primarily to meet an 'existing emergency' resulting from claims which, if allowed in accordance with *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, would have created 'wholly unexpected liabilities, immense in amount and retroactive in operation.'" 350 U.S. 253. "This purpose was fulfilled by the enactment of Section 2" of the Act, *ibid.*, which governs employers' liability for "any activity of an employee engaged in prior to the date of the enactment of this Act." 29 U.S.C. 252. For those existing cases,

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associated with using the time clocks simply by requiring employees to clock in before donning and clock out after doffing.

Section 2 adopted a special retrospective rule: employees need only be compensated as contemplated by the terms of the employment contract or by the custom or policy of the employer. *Ibid.*[14] This rule applied regardless whether the activity occurred during the workday or outside of it. *Ibid.*[15]

The distinct question of what *prospective* rule should govern future claims under the FLSA was the subject of dis-

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[14] Congress also enacted several other provisions intended to address circumstances that exacerbated the problem of unexpected liabilities. See Section 6, 29 U.S.C. 255 (imposing uniform federal statute of limitations); Sections 9-10, 29 U.S.C. 258-59 (creating defense for good faith reliance on administrative rulings or interpretations); Section 11, 29 U.S.C. 260 (making liquidated damages discretionary for good faith violations).

[15] Section 2 provides:

> No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938 * * * (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—
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> (1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or
>
> (2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

pute and, ultimately, a compromise that governs this case. Some in Congress believed that the Court's basic error in *Mount Clemens* was imposing a uniform statutory definition of "work" rather than leaving the term to be defined by the contract or custom between employers and employees. See H.R. Rep. No. 80-71, at 2; 93 Cong. Rec. 1492 (1947) (statement of Rep. Gwynne); *id.* at 1497 (statement of Rep. Goodwin). These members advocated applying Section 2's broad proscription to all claims, past and future. *Ibid.* Other members of Congress, however, believed that a uniform federal definition of work was required in order to ensure that in the future workers would receive fair compensation for actual work performed during the workday. See, *e.g.*, H.R. Rep. No. 80-71, at 16-17 (minority report); 93 Cong. Rec. 2362 (1947) (statement of Sen. Donnell). The error in *Mount Clemens*, in their view, was simply that the Court defined work too broadly by including preliminary and postliminary activities as part of the workday. *Ibid.*[16] This latter view prevailed and is reflected in Section 4 of the Act, the provision that governs the case now before this Court. See S. Rep. No. 80-48, at 48.

The First Circuit thus misapprehended the relevance of the fact that Congress reacted to *Mount Clemens* by enacting the Portal Act. Congress did not respond to the decision by rendering all walking and waiting presumptively non-compensable regardless of when they occur in all future cases. Instead, Congress pervasively excluded compensation for such walking and waiting only with respect to cases arising before the enactment of the Portal Act, recognizing the unfairness to employers of this unexpected retrospective liability. See 29 U.S.C. 252. The rule for future cases, enacted in Section 4, was substantially more favorable to employees,

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[16] This Court's definition of work in *Tennessee Coal* and its progeny had not distinguished between activities that took place during or outside of the "workday." See, *e.g.*, *Jewel Ridge Coal Corp.* v. *Local No. 6167*, 325 U.S. 161, 169 (1945).

recognizing that employers could plan appropriately for their future liabilities for compensation.[17]

3. The First Circuit further erred in suggesting (Pet. App. 9a-10a) that petitioners' straightforward application of the statutory text would lead to absurd and unfair results. See also *Alvarez* Pet. for Cert. 17 (same). The court of appeals hypothesized, for example, that an employee could extend his workday by putting on a hard hat when he got out of bed in the morning, hours before his shift began. Pet. App. 9a-10a. Petitioners' construction of the Portal Act does not produce that absurd result. The employer has plenary authority over the start and conclusion of the workday, directing how and when to commence the first principal activity of the day, and how and when to complete the final principal activity. Here, respondent alone has the ability to arrange for the distribution of required health and safety equipment, including the time at which employees may arrive at distribution stations and the time at which the doffing process must be completed. An employee may no more unilaterally extend his workday by donning his equipment at the time of his choosing than he may extend his workweek by working after the end of his shift without his employer's consent. See, *e.g.*, 29 C.F.R. 790.7(h) ("Waiting time before the time established for the commencement of work would be regarded as preliminary activity when the employee voluntarily arrives early at his place of employment earlier than he is either required or expected to arrive.").[18]

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[17] Congress did not even intend to eliminate compensation for all of the activities found compensable in *Mount Clemens* itself. Compare, *e.g.*, 328 U.S. at 692-93 ("preparing the equipment for productive work" and "sharpening tools" compensable) with S. Rep. No. 80-48, at 48 (preparing lathe for work part of worker's principal activities); *Mitchell* v. *King Packing Co.*, 350 U.S. 260, 262-63 (1956) (sharpening knives compensable under Portal Act).

[18] Moreover, even if an employer, for some reason, required or permitted an employee to don safety equipment at home several

Likewise, an employer is not required to permit employees to don their equipment early, only to then engage in idle conversation or other personal pursuits. Nothing prevents an employer such as respondent from requiring employees to arrive at the donning area at a specific time shortly before the start of the shift, don their equipment, and proceed immediately to the floor. Of course, if some employees choose to arrive to work earlier than required in order to stop by the cafeteria or visit with friends before the shift, respondent is not required to compensate them for that time. See 29 C.F.R. 790.7(h).

Nor does petitioners' interpretation of the Act unfairly burden respondent with the cost of unproductive time. Respondent may take any number of steps to reduce the cost of the donning and doffing process, including moving the equipment closer to the factory floor or improving the efficiency of the distribution process (for example, by designating additional staff to assist in distributing equipment from the cages or by opening additional cages). Congress would not have thought it unfair or inappropriate to place the cost of the inefficiencies of the current practice on the employer that controls the process, that alone has the power to make the procedure more efficient, and for whose benefit the process exists. Under the First Circuit's construction of the Portal Act, by contrast, respondent has no incentive to improve the process, because it bears none of the costs of its own inefficiencies.

The First Circuit's rule, moreover, is entirely unadministrable. The court of appeals held that "a reasonable amount of waiting time is intended to be preliminary or postliminary," Pet. App. 12a, but took no steps to define what constitutes a

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hours before the start of the shift, the interval between donning and the commencement of productive work would fall within the bona fide break rule, because that period of inactivity would be "long enough to enable him to use the time effectively for his own purposes," 29 C.F.R. 785.16(a).

"reasonable amount" of time to wait or what factors would inform that inquiry. Nor did the court of appeals give any indication of how employers and courts would discern which types of activities are "true" principal activities that commence the workday, and which are merely "integral and indispensable" activities that do not. Because the court of appeals developed these standards itself rather than deferring to the views of the Department of Labor, there are no administrative regulations that could aid in resolving these questions. The uncertainty inherent in such vague legal standards serves only to promote labor discord and, ultimately, litigation.

4. Finally, it bears noting that, as discussed above, the First Circuit's construction of the statute and the regulations conflicts with the views of the Department of Labor as expressed in the *amicus curiae* brief filed by the Department in that court.

To justify its rejection of petitioners' construction of the Portal Act, the court of appeals relied heavily on its conclusion that petitioners' interpretation is contrary to the view expressed in the Department of Labor's regulations. See Pet. App. 8a-9a, 11a-12a. The Department itself, however, explained to the First Circuit that respondent's interpretation of the regulations was incorrect and that the walking and waiting at issue in this case were compensable because they occurred during the workday. See *id.* 9a. This Court has held that the Department's interpretation of its own regulations "is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (citation omitted). As described above, the Department's interpretation of the regulations is not only reasonable, but is in fact compelled by the plain language of the Act and the underlying congressional purposes.[19]

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[19] Contrary to the suggestion of the court of appeals (Pet. App. 8a-9a) and the petitioner in *Alvarez* (Pet. for Cert. 13-14), footnote 49 to 29 C.F.R. 790.7(g) does not support the First Circuit's ruling. That footnote states, in relevant part:

5. The court of appeals rejected the Secretary's interpretation because it believed that the Secretary's position "pushes so far that it threatens to undermine the Portal-to-Portal Act." Pet. App. 10a. This conclusion was wrong. Petitioners' and the Secretary's interpretation leaves ample room for a robust application of the Portal Act to the types of preliminary and postliminary activities Congress intended Section 4 to address. For example, under petitioners' interpretation, the Act still exempts employers from having to compensate employees for ordinary commuting time, 29 C.F.R. 790.7(c), 785.35, for employer-provided transportation to a worksite at the beginning and end of the workday, *id.*

> Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity." See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298. See also paragraph (h) of this section and § 790.8(c). This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

The first sentence of the footnote simply makes the observation that clothes-changing may or may not be a principal activity. While the second sentence is not a model of clarity, read in light of the regulations as a whole, it must be interpreted to simply take no position regarding the circumstances under which travel between a washroom or clothes-changing place and the place of performance of a principal activity would fall within Section 4(a) of the Portal Act. The footnote certainly cannot be read as intending to discard the longstanding continuous workday rule or to mean the opposite of what the agency clearly instructs in the main body of regulations. Nor has the Department of Labor so construed this footnote to its own regulations. See Brief for the Secretary of Labor As *Amicus Curiae* Supporting Petition for Panel Rehearing and Petition for Rehearing En Banc 10-11.

§ 790.7(f), and for the time spent walking from the plant entrance to the donning area where the day's principal activities begin, *ibid.* When an employer requires workers to use a time-clock prior to commencing their principal activities, time spent waiting to clock in also falls within the Portal Act limitations. *Ibid.* And time spent changing into ordinary work clothes or uniforms before and after work remains non-compensable, absent a contract or custom to the contrary. *Ibid.* These are precisely the types of activities that Congress was most concerned about when it enacted the Portal Act. See, *e.g.*, S. Rep. No. 80-48, at 47. By contrast, there is no warrant to extend the Portal Act's exemption from compensation to the activities at issue in this case, which occur during the workday, and which petitioners undertook entirely at respondent's direction, under respondent's control, and for respondent's benefit.

III. Petitioners Are Also Entitled To Compensation Because Walking And Waiting Are Integral And Indispensable To Their Principal Activities.

The previous section established that the court of appeals erred in holding that petitioners' donning and doffing activities occurred outside of the workday and, therefore, were exempt from compensation under Section 4 of the Portal Act. This Court need not, however, ultimately resolve the proper construction of the workday in order to decide this case. As the First Circuit recognized (see Pet. App. 7a), under *Steiner* v. *Mitchell*, 350 U.S. 247, 255 (1956), an activity that is "integral and indispensable" to a principal activity is compensable notwithstanding the Portal Act *regardless* of whether it occurs during the workday. The walking and waiting in this case are integral and indispensable to petitioners' principal activities and, therefore, are compensable on that independent basis.[20]

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[20] Of course, in petitioners' view, an "integral and indispensable" activity is compensable under *Steiner* because it is part of that

In *Steiner*, this Court held that Congress did not intend the Portal Act "to deprive employees of the benefits of the Fair Labor Standards Act" with respect to activities that "are an integral and indispensable part of their principal activities." 350 U.S. at 255. This Court further held that the term "principal activity or activities" includes any activity that is "'made necessary by the nature of the work performed,'" "'directly benefit[s]' petitioners in the operation of their business," and is "so closely related to other duties performed by [petitioners'] employees as to be an integral part [of] * * * the principal activities of said employees.'" *Id.* at 252 (internal citations omitted). See also 29 C.F.R. 790.8(b)-(c) (term "principal activity" includes "*all* activities which are an integral part of a principal activity," and *any* "closely related activities which are indispensable to [the] performance" of that activity (emphasis added)).

The walking and waiting in the case easily meet that standard. First, the walking and waiting are "made necessary by the nature of the work performed." *Steiner*, 350 U.S. at 252. In accordance with state and federal safety and sanitary regulations, respondent prohibits petitioners from working on the production floor unless they are wearing all of the required clothing and safety equipment. Pet. App. 23a-25a. Thus, the donning and doffing must take place away from the processing area, thereby necessitating the walking for which petitioners seek compensation. In addition, walking and waiting are required by virtue of the manner in which respondent has chosen to organize its process for distributing required equipment. Respondent has put the required lab coats on racks and tubs with other equipment along the hallway between the building entrance and the equipment cages. See *id.* 3a-4a. Employees must wait in line at the equipment cage, retrieve equipment, then walk to the racks, where there is additional waiting, and then to the tubs. See *id.* 4a. Workers

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principal activity and, therefore, necessarily occurs during the workday. See Part II(A), *supra*.

are also required to wear equipment that they store in personal lockers. See *id.* 3a-4a. All employees must walk from the initial donning area to the production floor, where still more equipment is stored in tubs. *Id.* 4a. By arranging its distribution of equipment in this manner, respondent has made both walking and waiting an integral part of the donning process. Similarly without post-shift waiting and walking time, petitioners could not doff their equipment in the manner prescribed by respondent. Nor could respondent ensure that the equipment was collected, cleaned, and ready for the next shift of workers.

All of this activity "directly benefit[s]" respondent "in the operation of [its] business." *Steiner*, 350 U.S. at 252. See also *id.* at 250-53 (clothes-changing compensable when undertaken to comply with state "industrial hygiene" requirements). Finally the walking and waiting are "closely related to other duties performed by" petitioners at the plant. *Id.* at 252. Indeed, the walking and waiting are inextricable from the donning and doffing process.

Petitioners' claims are, in fact, indistinguishable from those upheld in *Steiner*. Although not separately discussed, walking and waiting necessarily were a part of the clothes-changing and showering activities found compensable in *Steiner*. As described by this Court, the workers were required to pick up their work clothes and proceed to a changing area before beginning work. See 350 U.S. at 250-51 (describing process). At the end of the day, they were required to change out of their work clothes, take the soiled clothing to a collection point to be cleaned, walk to the showers, walk back to the changing area, and put on their street clothes. *Ibid.* Likewise, the knife-sharpening activities found compensable by this Court in *Mitchell* v. *King Packing Co.*, 350 U.S. 260 (1956), necessarily entailed walking between the slaughterhouse floor and the sharpening room, and between the emery wheel and the grindstone. See *id.* at 262. Respondent cannot plausibly claim that this Court intended to de-

prive the workers in *Steiner* and *Mitchell* of compensation for the inherent walking and waiting time in those cases.

The legislative history also refutes the court of appeals' assumption that Congress contemplated that walking and waiting generally would not be a constituent part of a principal activity. In one of the examples of a compensable principal activity given in the Senate Report, a garment worker in a textile mill was required to spend thirty minutes before each shift "distribut[ing] clothing or parts of clothing at the workbenches of other employees." S. Rep. No. 48, at 48 (1947). There can be no doubt that Congress intended the entire thirty-minute distribution process, including the walking from bench to bench, to be considered a principal activity. See, *e.g.*, 93 Cong. Rec. 2293-94 (1947) (colloquy between Sens. Cooper and Lodge).

The regulations accordingly provide that waiting time can be an integral and indispensable part of a principal activity, even when the waiting is the first activity of the day:

> Where * * * an employee is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities.

29 C.F.R. 790.7(h); see also *id.* § 790.6(b) (same); 93 Cong. Rec. 2298 (1947) ("[W]hen an employee reports at the actual place of performance of his principal activity, his workday commences, and the time should be compensated for.") (statement of Sen. Cooper). Likewise, the regulations specifically contemplate that travel may be an integral part of a worker's principal activities. See 29 C.F.R. 785.38 ("[T]ravel from job site to job site during the workday[] must be counted as hours worked"); *id.* § 790.7(c) (Portal Act does not apply

to "travel from the place of performance of one principal activity to the place of performance of another").

More generally, Congress made clear that it intended "the words 'principal activities' to be construed liberally" and "to include any work of consequence performed for an employer, no matter when the work is performed." 29 C.F.R. 790.8(a). "[T]he only activities excluded from FLSA coverage are those undertaken 'for [the employees'] own convenience, not being required by the employer and not being necessary for the performance of their duties for the employer.'" *Dunlop* v. *City Electric, Inc.*, 527 F.2d 394, 398 (CA5 1976); see also *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 750 F.2d 47, 50 (CA8 1984) (same). The walking and waiting in this case were undertaken solely because respondent required them as integral and indispensable parts of the donning and doffing process. The time is therefore compensable.

The court of appeals nonetheless held that the donning and doffing process as a whole did not constitute a "principal activity," because "a line must be drawn, otherwise an endless number of activities that precipitate the employees' essential tasks would be compensable." Pet App. 12a. While it is obviously true that a line must be drawn between principal and preliminary activities, the court of appeals erred in thinking that petitioners' position erodes the distinction Congress drew. The relationship between the walking and waiting and the principal activity of donning and doffing in this case is exceedingly close. Walking and waiting are not only required in order to complete the donning and doffing process, but are proximately and inextricably intertwined in the process itself. Indeed, the activities sometimes occur simultaneously. See Resp. Br. in Opp. 15 (noting that some employees don their clothes "along the way" from the final equipment station to the production floor). Petitioners' claim does not, therefore, rely on an attenuated chain of causation that could improperly expand the concept of "principal activity" or unduly restrict the scope of the Portal Act. Petitioners are accordingly enti-

tled to compensation because walking and waiting are integral and indispensable to their principal activities.

IV. The *De Minimis* Rule Has No Application To This Case.

A concurring opinion below suggested that petitioners were not entitled to compensation under the Portal Act for an entirely different reason. That opinion proposed "treat[ing] required donning and doffing as compensable when more than *de minimis* but, where it is not, leaving both it and any associated walking and waiting time as non-compensable." Pet. App. 18a. This Court need not evaluate this suggestion here, for it was not the basis of the decision below – a point that *respondent* made in opposing review of the *de minimis* issues in this case at the certiorari stage.[21]

If the Court were to consider the argument, however, it should hold that the amount of time spent on an activity is irrelevant to whether it constitutes a "principal activity" under the Portal Act. In any event, the donning and doffing at issue here were not *de minimis* under any proper legal standard.

A. The *De Minimis* Rule Has No Application To The Determination Whether Donning And Doffing Are "Principal Activities" Under The Portal Act.

The theory proposed by the concurrence below is both odd and unsupported by the language, history, and purposes of the Portal Act. Under the concurrence's construction,

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[21] Petitioners sought certiorari to review a related question under the *de minimis* doctrine, namely whether the "walking and waiting time [is] rendered non-compensable merely because the associated compensable donning and doffing time is *de minimis* in isolation, even if the aggregate waiting, walking, donning, and doffing period is not *de minimis*." Pet. i. Respondent opposed review of this question on the ground that the "issue was not addressed by the court of appeals and played no part in its decision." Resp. Br. in Opp. 19. This Court, in turn, granted certiorari on specified issues that did not include the *de minimis* issue. 125 S. Ct. 1295.

workers would be entitled to compensation for the entirety of a twenty-minute donning process if they spent five minutes waiting, followed by fifteen minutes donning clothing, but they would be entitled to no compensation whatsoever if they were required to spend fifteen minutes waiting, followed by five minutes of donning. There is no basis for concluding that Congress intended such an incongruous result. To the contrary, the duration of an activity has no bearing on whether it constitutes a "principal activity" under the Portal Act.

1. This Court raised the possibility of applying a *de minimis* doctrine to claims under the FLSA in the same decision that prompted Congress to enact the Portal Act, *Anderson* v. *Mount Clemens Pottery Co.*, 328 U.S. 680 (1946). That decision subjected employers to liability for failure to pay wages for preliminary and postliminary activities that many employers had previously thought non-compensable and for which they had kept no records. See S. Rep. No. 80-37, at 27 (1947). As a limitation on the scope of employer liability, this Court noted that its decision did not "preclude the application of a *de minimis* rule" when "the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours." 328 U.S. at 692. "[S]uch trifles may be disregarded," the Court explained, because "[s]plit second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act." *Ibid.*

The *de minimis* rule was applied in *Mount Clemens* to mitigate the potentially harsh effects of this Court's expansive interpretation of the workweek. See 328 U.S. at 692-93. Indeed, the opponents of the Portal Act argued that this *de minimis* limitation would ultimately lead to the dismissal of most of the litigation inspired by *Mount Clemens*, making a legislative solution unnecessary. See, *e.g.*, H.R. Rep. No 80-71, at 11-12 (Minority Report) (1947); 93 Cong. Rec. 2300, 2301 (1947) (statements of Sen. Pepper). The majority in Congress, however, was not persuaded. See, *e.g.*, 93 Cong.

Rec. 2300 (1947) (statement of Sen. Cooper). Congress enacted a different solution to distinguish between compensable and non-compensable "work beyond the scheduled working hours," *Mt. Clemens*, 328 U.S. at 692, providing in the Portal Act that – absent a contrary contract or custom – such claims are never compensable outside of the workday. See S. Rep. No. 80-48, at 47; H.R. Rep. No. 80-71, at 2-3.

There is no indication that Congress nevertheless intended for the *de minimis* rule to play a role in defining the workday under the Act.[22] The statute's language excludes from the Act's purview work between first and last "principal activity or activities," without reference to the amount of time devoted to the task. 29 U.S.C. 254. The regulations similarly contain no reference to duration in defining a "principal activity" or the workday. See, *e.g.*, 29 C.F.R. 790.8.

To the contrary, Congress contemplated that a compensable principal activity could be of short duration. As the regulations recount, Senator Cooper, one of the Act's sponsors, and Senator McGrath made this point in a colloquy on the floor – the very same colloquy on which this Court relied in *Steiner*. See 29 C.F.R. 790.8 n.63; 350 U.S. at 256-59. The exchange arose as Senator Cooper was explaining the meaning of "principal activity" by citing the example in the Senate Report of the garment worker distributing piecework prior to her nominal shift. See S. Rep. No. 80-48, at 48. Senator McGrath noticed that the example in the Report stated that the workers engaged in this preparatory activity for thirty minutes. He asked whether this number had any significance in determining whether or not the activity was a principal activity. Senator Cooper said it did not:

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[22] Petitioners do not suggest that the *de minimis* rule has no application to the determination of compensable time, only that it has no bearing on the determination of when the workday starts and ends under the Portal Act.

> Mr. COOPER. No; there was no definite purpose in using the words 'thirty minutes' instead of 15 or 10 minutes or 5 minutes or any other number of minutes.
>
> Mr. McGRATH. Then we can clear that point up by reiterating that what the committee means is that any amount of time spent in the performance of the type of activity expressed in examples 1 and 2 is to be hereafter regarded as compensable time.
>
> Mr. COOPER. I should certainly say so, as part of the principal activity.

93 Cong. Rec. 2298 (1947).

There were moreover important practical reasons for Congress to avoid adding a durational qualifier to the definition of a principal activity. Congress knew that a great many workers begin their day with a series of short preparatory activities, like the garment worker in the example above, or the workers in *Steiner*, or a lathe operator who is required to oil or clean his machine before the start of the shift. See S. Rep. No. 80-48, at 48. Viewed in isolation, each of the garment worker or lathe operator's tasks could be considered *de minimis*, especially if the court dissected walking and waiting time for separate consideration. Applying a *de minimis* rule to decide when the workday started in such circumstances would risk depriving such workers of compensation Congress believed they deserved.

2. It is not difficult to identify similar examples from common experience that demonstrate the substantial administrative difficulties that would arise under the theory advanced by the concurrence. Consider, for example, a school custodian who is required to report to the school every morning at 6 a.m. to commence a series of small activities necessary to prepare the school for the start of the day. She may spend a half-hour walking throughout the building, unlocking each classroom and turning on its lights. The actual moments of unlocking the doors and flipping the light switches may take

only a minute or two in total, excluding the walking time. She may then be required to wait for the school's principal to arrive (some days for five minutes, other days for fifteen), before unlocking the main entrances to the school, a process that takes another ten minutes, nine of which are consumed by walking. She must then walk across the school's campus to the maintenance shed to retrieve her cleaning supplies and carry them back to the school to start buffing the floors in the hallway. Under the rule suggested by the concurrence, it is unclear when the custodian's workday began and whether she is entitled to pay for any of this time. Even accepting that unlocking the doors, turning on the lights, and gathering cleaning supplies are "integral and indispensable" to the custodian's principal activities, those activities took only a few minutes when considered apart from the inherent walking and waiting.

As this example illustrates, applying a *de minimis* test to preparatory activities at the beginning of the workday creates a series of difficult questions of application. Should the employer consider the time spent donning each piece of equipment separately or all the pieces taken together? Compare *Alvarez* v. *IBP, Inc.*, 339 F.3d 894, 903 (CA9 2003) (considering time taken to don hard hats and safety goggles separately from time taken to don Kevlar gloves and metal-mesh leggings) with *Reich* v. *IBP, Inc.*, 38 F.3d 1123, 1126 n.1 (CA10 1994) (considering time taken to don all gear collectively). Should donning and doffing time be considered separately or combined? Over the course of a day, a week, a pay period, a year? Must the time be recalculated every day when, for example, the duration of a morning meeting or the time spent gathering tools varies from day to day? And how much time is, in fact, *de minimis*? Five minutes per day? Fifteen? Thirty? These questions would not only have to be answered by each employer in the first instance, but would be subject to dispute by employees and, ultimately, determination by a jury. Cf. *Mt. Clemens*, 328 U.S. at 694 (noting *de minimis* inquiry turned on factual findings).

The uncertainty inherent in a *de minimis* standard ordinarily is mitigated by the very nature of potentially *de minimis* claims, which usually are not worth pursuing or defending against in litigation. However, by making the compensability of a substantial period of time (in this case, the twenty-minute donning and doffing process as a whole, accumulated over time) turn on the compensability of an arguably *de minimis* amount of time (the time spent changing) the rule proposed by the concurrence would sufficiently raise the stakes over the *de minimis* determination to make litigation under the standard worthwhile and, therefore, likely.

Congress acted to avoid such confusion and confrontation by creating bright lines in both the FLSA and the Portal Act, requiring overtime for work in excess of forty hours per week, 29 U.S.C. 207, but excusing employers from counting activities that occur before the first, or after the last, principal activity of the day, *id.* § 254. Indeed, Congress rejected the suggestion that it legislatively adopt a *de minimis* standard in response to *Mount Clemens* precisely because it viewed such a rule as unadministrable. See 93 Cong. Rec. 2300 (1947) ("[I]nstead of reducing or eliminating this litigation, it would have been increased, as we believe, tenfold.") (statement of Sen. Cooper). There is no ground for introducing a new element of ambiguity and unfairness into the statutory scheme.

B. No *De Minimis* Questions Arise In This Case Because The Walking And Waiting Here Are Not *De Minimis*.

In any event, there is no need for this Court to wade into this area to decide this case, for the time at issue here is not *de minimis* under any commonly accepted standard. The Department of Labor regulations provide that "insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded." 29 C.F.R. 785.47. Thus, to qualify as *de minimis*, an activity must meet three criteria: (1) the amount of time must be "in-

substantial or insignificant"; (2) the activity must occur "beyond the scheduled working hours"; and (3) it must be administratively impracticable to record the time. None of these criteria is met in this case.[23]

1. The time involved in this case is not insubstantial. The donning and doffing process as a whole (including walking and waiting) took approximately twenty minutes per day because of the inefficient distribution process maintained by respondent. Such an expenditure of time is not *de minimis*. See, *e.g.*, *Steiner* v. *Mitchell*, 350 U.S. 247, 251 (1956) (finding compensable thirty minutes per day of clothes-changing and showers).[24]

The jury verdict below is not to the contrary. Because the district court concluded that the walking and waiting elements of the donning and doffing process were noncompensable as a matter of law, the jury was never asked to examine the evidence regarding the length of time it took petitioners to complete the donning and doffing process as a whole. See Pet. App. 13a-34a. Instead, the jury examined only the amount of time spent actually putting on and taking off the equipment. See *id.* 5a.

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[23] Similar standards have been applied by the lower courts, although often as factors to be considered rather than a three-part test. See *Lindow* v. *United States*, 738 F.2d 1057, 1062 (CA9 1984) (collecting cases); see also, *e.g.*, *Brock* v. *City of Cincinnati*, 236 F.3d 793, 804 (CA6 2001); *Kosakow* v. *New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 719 (CA2 2001); *Reich* v. *Monfort, Inc.*, 144 F.3d 1329, 1333-34 (CA10 1998); *Nardone* v. *General Motors, Inc.*, 207 F. Supp. 336, 340 (D.N.J. 1962).

[24] See also, *e.g.*, *Kosakow*, 274 F.3d at 719 (fifteen minutes per day not *de minimis*); *Monfort, Inc.*, 144 F.3d at 1334 (ten minutes per day by workers at meat processing plant were not *de minimis*); *Metzler*, 127 F.3d at 965 (district court did not abuse discretion by finding fourteen minutes per day at meat processing plant were not *de minimis*).

There is no basis for excluding the walking and waiting time from the *de minimis* analysis. As respondents acknowledged to the First Circuit, any activity can be analytically subdivided to the point where every component is *de minimis*, see Supp. Br. of Barber Foods 5-6, including petitioners' basic chicken processing duties and the clothes-changing found compensable in *Steiner*.[25] But the workday must be "computed in light of the realities of the industrial world," *Anderson* v. *Mount Clemens Pottery Co.*, 328 U.S. 680, 692 (1946), and the reality in this case is that respondent has organized its donning and doffing process such that walking and waiting are a necessary and inextricable component of the process. See *supra* at 37-38. Even if it were appropriate to exclude compensation for such a process when it took a very short time, there is no basis for depriving petitioners of compensation for a lengthy process simply because some of its component parts can be completed quickly.

In any event, even if this Court considered only the time spent actually putting on and taking off the clothing and equipment, the time would not be *de minimis* when considered in light of its regular repetition. While spending a few minutes every now and again might be *de minimis*, the imposition of unpaid extra duties becomes substantial when repeated every working day. Even two minutes of daily unpaid time amounts to more than a full day of uncompensated work every year. There is no doubt that an employer would be liable for requiring employees to work without pay the last workday of every year. The injury to the employee, and benefit to the employer, is no different if the work is spread out over the course of a year. Courts have therefore looked to the total amount of a worker's time that has gone uncompensated in determining whether the worker's claim is *de mini-*

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[25] Thus, for example, the clothes-changing and showering in *Steiner* could be divided into smaller tasks – retrieving clothes, removing clothes, entering the shower, etc. – each of which involved *de minimis* time and would therefore be non-compensable.

mis, rather than looking exclusively to the size of the increments in which that claim accrued. See *Lindow* v. *United States*, 738 F.2d 1057, 1062 (CA9 1984) (collecting cases).

2. Even if this Court considered in isolation the time spent each day actually donning and doffing the equipment, and found it to be insubstantial, the *de minimis* rule would still not apply because the time is part of petitioners' regularly scheduled work time. To protect the integrity of the bright-line rules established in the Act, and to minimize the risk of strategic behavior by employers, the *de minimis* rule does not protect those who "arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him." 29 C.F.R. 785.47. Just as an employer may not set its hourly rate at five cents below the minimum wage and claim immunity under the *de minimis* rule, an employer may not schedule workers for forty hours and ten minutes per week, but then pay them only for forty hours. After all, the FLSA does not require employers to pay "*about* $5.15 an hour, *give or take*," or mandate overtime for any work above "forty *or so* hours per week." In the same vein, respondent may not structure its operations to require petitioners to routinely work more than forty hours per week by refusing to count donning and doffing time, even if that time is short.

3. Finally, respondent could easily record the amount of time petitioners spend each day in the donning and doffing process in a number of ways, including by simply moving the time clocks from the entrance to the factory floor to the entrance to the donning area.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully Submitted.

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APPENDIX

APPENDIX

1. Part 790 and Title 29 of the Code of Federal Regulations provides, in relevant part:

§ 790.1 Introductory statement.

(a) The Portal-to-Portal Act of 1947 was approved May 4, 1947.[1] It contains provisions which, in certain circumstances, affect the rights and liabilities of employees and employers with regard to alleged underpayments of minimum or overtime wages under the provisions of the Fair Labor Standards Act of 1938,2 the Walsh-Healey Public Contracts Act, and the Bacon-Davis Act. The Portal Act also establishes time limitations for the bringing of certain actions under these three Acts, limits the jurisdiction of the courts with respect to certain claims, and in other respects affects employee suits and proceedings under these Acts.[2]

For the sake of brevity, this Act is referred to in the following discussion as the Portal Act.

(b) It is the purpose of this part to outline and explain the major provisions of the Portal Act as they affect the application to employers and employees of the provisions of the Fair Labor Standards Act. The effect of the Portal Act in

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[1] An act to relieve employers from certain liabilities and punishments under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act, and for other purposes (61 Stat. 84; 29 U.S.C., Sup., 251 et seq.).

[2] 52 Stat. 1060, as amended; *29 U.S.C. 201* et seq. In the Fair Labor Standards Act, the Congress exercised its power over interstate commerce to establish basic standards with respect to minimum and overtime wages and to bar from interstate commerce goods in the production of which these standards were not observed. For the nature of liabilities under this Act, see footnote 17.

relation to the Walsh-Healey Act and the Bacon-Davis Act is not within the scope of this part, and is not discussed herein. Many of the provisions of the Portal Act do not apply to claims or liabilities arising out of activities engaged in after the enactment of the Act. These provisions are not discussed at length in this part,[3] because the primary purpose of this part is to indicate the effect of the Portal Act upon the future administration and enforcement of the Fair Labor Standards Act, with which the Administrator of the Wage and Hour Division is charged under the law. The discussion of the Portal Act in this part is therefore directed principally to those provisions that have to do with the application of the Fair Labor Standards Act on or after May 14, 1947.

(c) The correctness of an interpretation of the Portal Act, like the correctness of an interpretation of the Fair Labor Standards Act, can be determined finally and authoritatively only by the courts. It is necessary, however, for the Administrator to reach informed conclusions as to the meaning of the law in order to enable him to carry out his statutory duties of administration and enforcement. It would seem desirable also that he makes these conclusions known to persons affected by the law.[4] Accordingly, as in the case of the interpretative bulletins previously issued on various provisions of the Fair Labor Standards Act, the interpretations set forth herein are intended to indicate the construction of the law which the Administration believes to be correct[5] and

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[3] Sections 790.23 through 790.29 in the prior edition of this part 790 have been omitted in this revision because of their obsolescence in that they dealt with those sections of the Act concerning activities prior to May 14, 1947, the effective date of the Portal-to-Portal Act.

[4] See *Skidmore* v. *Swift & Co.*, 323 U.S. 134; *Kirschbaum Co.* v. *Walling*, 316 U.S. 517; Portal-to-Portal Act, sec. 10.

[5] The interpretations expressed herein are based on studies of the intent, purpose, and interrelationship of the Fair Labor Standards Act and the Portal Act as evidenced by their language

which will guide him in the performance of his administrative duties under the Fair Labor Standards Act, unless and until he is directed otherwise by authoritative rulings of the courts or concludes, upon reexamination of an interpretation, that it is incorrect. As the Supreme Court has pointed out, such interpretations provide a practical guide to employers and employees as to how the office representing the public interest in[6] enforcement of the law will seek to apply it. As has been the case in the past with respect to other interpretative bulletins, the Administrator will receive and consider statements suggesting change of any interpretation contained in this part.

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and legislative history, as well as on decisions of the courts establishing legal principles believed to be applicable in interpreting the two Acts. These interpretations have been adopted by the Administrator after due consideration of relevant knowledge and experience gained in the administration of the Fair Labor Standards Act of 1938 and after consultation with the Solicitor of Labor.

[6] *Skidmore* v. *Swift & Co.*, 323 U.S. 134. See also *Roland Electrical Co.* v. *Walling*, 326 U.S. 657; *United States* v. *American Trucking Assn.*, 310 U.S. 534; *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572.

§ 790.2 Interrelationship of the two acts.

(a) The effect on the Fair Labor Standards Act of the various provisions of the Portal Act must necessarily be determined by viewing the two acts as interelated parts of the entire statutory scheme for the establishment of basic fair labor standards.[7] The Portal Act contemplates that employers will be relieved, in certain circumstances, from liabilities or punishments to which they might otherwise be subject under the Fair Labor Standards Act.[8] But the act makes no express change in the national policy, declared by Congress in section 2 of the Fair Labor Standards Act, of eliminating labor conditions "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." The legislative history indicates that the Portal Act was not intended to change this general policy.[9]

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[7] As appears more fully in the following sections of this part, the several provisions of the Portal Act relate, in pertinent part, to actions, causes of action, liabilities, or punishments based on the nonpayment by employers to their employees of minimum or overtime wages under the provision of the Fair Labor Standards Act. Section 13 of the Portal Act provides that the terms, "employer," "employee," and "wage", when used in the Portal Act, in relation to the Fair Labor Standards Act, have the same meaning as when used in the latter Act.

[8] Portal Act, sections 1, 2, 4, 6, 9, 10, 11, 12.

Sponsors of the legislation asserted that the provisions of the Portal Act do not deprive any person of a contract right or other right which he may have under the common law or under a State statute. See colloquy between Senators Donnell, Hatch and Ferguson, 93 Cong. Rec. 2098; colloquy between Senators Donnell and Ferguson, 93 Cong. Rec. 2127; statement of Representative Gwynne, 93 Cong. Rec. 1557.

[9] See references to this policy at page 5 of the Senate Committee Report on the bill (Senate Rept. 48, 80th Cong., 1st sess.), and in statement of Senator Donnell, 93 Cong. Rec. 2177; see also statement of Senator Morse, 93 Cong. Rec. 2274; statement of Representative Walter, 93 Cong. Rec. 4389.

The Congressional declaration of policy in section 1 of the Portal Act is explicitly directed to the meeting of the existing emergency and the correction, both retroactively and prospectively, of existing evils referred to therein.[10] Sponsors of the legislation in both Houses of Congress asserted that it "in no way repeals the minimum wage requirements and the overtime compensation requirements of the Fair Labor Standards Act"[11] that it "protects the legitimate claims" under that Act,[12] and that one of the objectives of the sponsors was to "preserve to the worker the rights he has gained under the Fair Labor Standards Act."[13] It would therefore appear that the Congress did not intend by the Portal Act to change the general rule that the remedial provisions of the Fair Labor

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[10] Cf. House Rept. No. 71; Senate Rept. No. 48; House (Conf.) Rept. No. 326, 80th Cong., 1st sess. (referred to hereafter as House Report, Senate Report, and Conference Report); statement of Representative Michener, 93 Cong. Rec. 4390; statement of Senator Wiley, 93 Cong. Rec. 4269, 4270; statement of Representative Gwynne, 93 Cong. Rec. 1572; statements of Senator Donnell, 93 Cong. Rec. 2133-2135, 2176-2178; statement of Representative Robison, 93 Cong. Rec. 1499; Message of the President to Congress, May 14, 1947 on approval of the Act (93 Cong. Rec. 5281).

[11] Statements of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269 and 4371. See also statement of Senator Cooper, 93 Cong. Rec. 2295; statement of Representative Robsion, 93 Cong. Rec. 1499, 1500.

[12] Statement of Representative Michener, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4391. See also statement of Representative Keating, 93 Cong. Rec. 1512.

[13] Statement of Senator Cooper, 93 Cong. Rec. 2300; see also statements of Senator Donnell, 93 Cong. Rec. 2361, 2362, 2364; statements of Representatives Walter and Robsion, 93 Cong. Rec. 1496, 1498.

Standards Act are to be given a liberal interpretation[14] and exemptions therefrom are to be narrowly construed and limited to those who can meet the burden of showing that they come "plainly and unmistakably within (the) terms and spirit" of such an exemption.[15]

(b) It is clear from the legislative history of the Portal Act that the major provisions of the Fair Labor Standards Act remain in full force and effect, although the application of some of them is affected in certain respects by the 1947 Act. The provisions of the Portal Act do not directly affect the provisions of section 15(a)(1) of the Fair Labor Standards Act banning shipments in interstate commerce of "hot" goods produced by employees not paid in accordance with the Act's requirements, or the provisions of section 11(c) requiring employers to keep records in accordance with the regulations prescribed by the Administrator. The Portal Act does not affect in any way the provision in section 15(a)(3) banning discrimination against employees who assert their rights under the Fair Labor Standards Act, or the provisions of section 12(a) of the Act banning from interstate commerce goods produced in establishments in or about which oppressive child labor is employed. The effect of the Portal Act in relation to the minimum and overtime wage requirements of the Fair Labor Standards Act is considered in this part in connection with the discussion of specific provisions of the 1947 Act.

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[14] *Roland Electrical Co.* v. *Walling*, 326 U.S. 657; *United States* v. *Rosenwasser*, 323 U.S. 360; *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697.

[15] See *Phillips Co.* v. *Walling*, 324 U.S. 490; *Walling* v. *General Industries Co.*, 330 U.S. 545.

§ 790.5 Effect of Portal-to-Portal Act on determination of hours worked.

(a) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act to activities of employees on or after May 14, 1947, the determination of hours worked is affected by the Portal Act only to the extent stated in section 4(d). This section requires that:

> . . . in determining the time for which an employer employs an employee with respect to walking, riding, traveling or other preliminary or postliminary activities described (in section 4(a)) there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable (under contract, custom, or practice within the meaning of section 4 (b), (c)).[26]

This provision is thus limited to the determination of whether time spent in such "preliminary" or "postliminary" activities, performed before or after the employee's "principal activities" for the workday[27] must be included or excluded in computing time worked.[28] If time spent in such an activity would be time worked within the meaning of the Fair Labor Standards Act if the Portal Act had not been enacted,[29] then the question whether it is to be included or excluded in computing hours worked under the law as changed by this provision depends on the compensability of the activity under the relevant contract, custom, or practice applicable to the employment. Time occupied by such an activity is to be excluded in computing the time worked if, when the employee is so engaged, the activity is not compensable by a contract, custom, or practice within the meaning of section 4; otherwise it must be included as worktime in calculating

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[26] The full text of section 4 of the Act is set forth in § 790.3.

[27] See § 709.6. Section 4(d) makes plain that subsections (b) and (c) of section 4 likewise apply only to such activities.

[28] Conference Report, p. 13.

[29] See footnote 18.

minimum or overtime wages due.[30] Employers are not relieved of liability for the payment of minimum wages or overtime compensation for any time during which an employee engages in such activities thus compensable by contract, custom, or practice.[31] But where, apart from the Portal Act, time spent in such an activity would not be time worked within the meaning of the Fair Labor Standards Act, although made compensable by contract, custom, or practice, such compensability will not make it time worked under section 4(d) of the Portal Act.

(b) The operation of section 4(d) may be illustrated by the common situation of underground miners who spend time in traveling between the portal of the mine and the working face at the beginning and end of each workday. Before enactment of the Portal Act, time thus spent constituted hours worked. Under the law as changed by the Portal Act, if there is a contract between the employer and the miners calling for payment for all or a part of this travel, or if there is a custom or practice to the same effect of the kind described in section 4, the employer is still required to count as hours worked, for purposes of the Fair Labor Standards Act, all of the time spent in the travel which is so made compensable.[32] But if there is no such contract, custom, or practice, such time will be excluded in computing worktime for purposes of the Act. And under the provisions of section 4(c) of the Portal Act,[33] if a contract, custom, or practice of the kind described makes such travel compensable only during the portion of the day before

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[30] See Conference Report, pp. 10, 13.

[31] Conference Report, p. 10.

[32] Cf. colloquies between Senators Donnell and Hawkes, 93 Cong. Rec. 2179, 2181, 2182; colloquy between Senators Ellender and Cooper, 83 Cong. Rec. 2296-2297; colloquy between Senators McGrath and Cooper, 93 Cong. Rec. 2297-2298. See also Senate Report, p. 48.

[33] See § 790.3 and Conference Report pp. 12, 13. See also Senate Report, p. 48.

the miners arrive at the working face and not during the portion of the day when they return from the working face to the portal of the mine, the only time spent in such travel which the employer is required to count as hours worked will be the time spent in traveling from the portal to the working face at the beginning of the workday.

§ 790.6 Periods within the "workday" unaffected.

(a) Section 4 of the Portal Act does not affect the computation of hours worked within the "workday" proper, roughly described as the period "from whistle to whistle," and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by an employee during that period.[34] Under the provisions of section 4, one of the conditions that must be present before "preliminary" or "postliminary" activities are excluded from hours worked is that they 'occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday at which he ceases' the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal

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[34] The report of the Senate Judiciary Committee states (p. 47), "Activities of an employee which take place during the workday are * * * not affected by this section (section 4 of the Portal-to-Portal Act, as finally enacted) and such activities will continue to be compensable or not without regard to the provisions of this section."

Act had not been enacted.[35] The principles for determining hours worked within the "workday" proper will continue to be those established under the Fair Labor Standards Act without reference to the Portal Act,[36] which is concerned with this question only as it relates to time spent outside the "workday" in activities of the kind described in section 4.[37]

(b) "Workday" as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period. For example, a rest period or a lunch period is part of the "workday", and section 4 of the Portal Act therefore plays no part in determining whether such a period, under the particular circumstances presented, is or is not compensable, or whether it should be included in the computation of hours worked.[38] If an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his "workday" commences at the time he reports there for work in accordance with the

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[35] See Senate Report, pp. 47, 48; Conference Report, p. 12; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269 (also 2084, 2085); statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388; statements of Senator Cooper, 93 Cong. Rec. 2293-2294, 2296-2300; statements of Senator Donnell, 93 Cong. Rec. 2181, 2182, 2362.

[36] The determinations of hours worked under the Fair Labor Standards Act, as amended is discussed in part 785 of this chapter.

[37] See statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 3269. See also the discussion in § § 790.7 and 790.8.

[38] Senate Report, pp. 47, 48. Cf. statement of Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Senator Donnell, 93 Cong. Rec. 2362; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298.

employer's requirement, even though through a cause beyond the employee's control, he is not able to commence performance of his productive activities until a later time. In such a situation the time spent waiting for work would be part of the workday,[39] and section 4 of the Portal Act would not affect its inclusion in hours worked for purposes of the Fair Labor Standards Act.

§ 790.7 "Preliminary" and "postliminary" activities.

(a) Since section 4 of the Portal Act applies only to situations where employees engage in "preliminary" or "postliminary" activities outside the workday proper, it is necessary to consider what activities fall within this description. The fact that an employee devotes some of his time to an activity of this type is, however, not a sufficient reason for disregarding the time devoted to such activity in computing hours worked. If such time would otherwise be counted as time worked under the Fair Labor Standards Act, section 4 may not change the situation. Whether such time must be counted or may be disregarded, and whether the relief from liability or punishment afforded by section 4 of the Portal Act is available to the employer in such a situation will depend on the compensability of the activity under contract, custom, or practice within the meaning of that section.[40] On the other hand, the criteria described in the Portal Act have no bearing on the compensability or the status as worktime under the Fair Labor Standards Act of activities that are not "preliminary" or "postliminary" activities outside the

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[39] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297, 2298.

[40] See Conference Report, pp. 10, 12, 13; statements of Senator Donnell, 93 Cong. Rec. 2178-2179, 2181, 2182; statements of Senator Cooper, 93 Cong. Rec. 2297, 2298. See also § § 790.4 and 790.5.

workday.[41] And even where there is a contract, custom, or practice to pay for time spent in such a "preliminary" or "postliminary" activity, section 4(d) of the Portal Act does not make such time hours worked under the Fair Labor Standards Act, if it would not be so counted under the latter Act alone.[42]

(b) The words "preliminary activity" mean an activity engaged in by an employee before the commencement of his "principal" activity or activities, and the words "postliminary activity" means an activity engaged in by an employee after the completion of his "principal" activity or activities. No categorical list of "preliminary" and "postliminary" activities except those named in the Act can be made, since activities which under one set of circumstances may be "preliminary" or "postliminary" activities, may under other conditions be "principal" activities. The following "preliminary" or "postliminary" activities are expressly mentioned in the Act: "Walking, riding, or traveling to or from the actual place of performance of the principal activity or activities which (the) employee is employed to perform."[43]

(c) The statutory language and the legislative history indicate that the "walking, riding or traveling" to which section 4(a) refers is that which occurs, whether on or off the employer's premises, in the course of an employee's ordinary daily trips between his home or lodging and the actual place where he does what he is employed to do. It does not, however, include travel from the place of performance of one principal activity to the place of performance of another, nor

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[41] See Conference Report, p. 12; Senate Report, pp. 47, 48; statement of Senator Wiley, explaining the conference agreement to the Senate, 93 Cong. Rec. 4269; statement of Representative Gwynne, explaining the conference agreement to the House of Representatives, 93 Cong. Rec. 4388. See also § 790.6.

[42] See § 790.5(a).

[43] Portal Act, subsections 4(a), 4(d). See also Conference Report, p. 13; statement of Senator Donnell, 93 Cong. Rec. 2181, 2362.

does it include travel during the employee's regular working hours.[44] For example, travel by a repairman from one place where he performs repair work to another such place, or travel by a messenger delivering messages, is not the kind of "walking, riding or traveling" described in section 4(a). Also, where an employee travels outside his regular working hours at the direction and on the business of his employer, the travel would not ordinarily be "walking, riding, or traveling" of the type referred to in section 4(a). One example would be a traveling employee whose duties require him to travel from town to town outside his regular working hours; another would be an employee who has gone home after completing his day's work but is subsequently called out at night to travel a substantial distance and perform an emergency job for one of his employer's customers.[45] In situations such as these, where an employee's travel is not of the kind to which section 4(a) of the Portal Act refers, the question whether the travel time is to be counted as worktime under the Fair Labor Standards Act will continue to be determined by principles established under this Act, without reference to the Portal Act.[46]

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[44] These conclusions are supported by the limitation, "to and from the actual place of performance of the principal activity or activities which (the) employee is employed to perform," which follows the term "walking, riding or traveling" in section 4(a), and by the additional limitation applicable to all "preliminary" and "postliminary" activities to the effect that the Act may affect them only if they occur "prior to" or "subsequent to" the workday. See, in this connection the statements of Senator Donnell, 93 Conf. Rec. 2121, 2181, 2182, 2363; statement of Senator Cooper, 93 Cong. Rec. 2297. See also Senate Report, pp. 47, 48.

[45] The report of the Senate Judiciary Committee (p. 48) emphasized that this section of the Act "does not attempt to cover by specific language that many thousands of situations that do not readily fall within the pattern of the ordinary workday."

[46] These principles are discussed in part 785 of this chapter.

(d) An employee who walks, rides or otherwise travels while performing active duties is not engaged in the activities described in section 4(a). An illustration of such travel would be the carrying by a logger of a portable power saw or other heavy equipment (as distinguished from ordinary hand tools) on his trip into the woods to the cutting area. In such a situation, the walking, riding, or traveling is not segreable from the simultaneous performance of his assigned work (the carrying of the equipment, etc.) and it does not constitute travel "to and from the actual place of performance" of the principal activities he is employed to perform.[47]

(e) The report of the Senate Committee on the Judiciary (p. 47) describes the travel affected by the statute as "Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities within the employer's plant, mine, building, or other place of employment, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out." The phrase, "actual place of performance," as used in section 4(a), thus emphasizes that the ordinary travel at the beginning and end of the workday to which this section relates includes the employee's travel on the employer's premises until he reaches his workbench or other place where he commences the performance of the principal activity or activities, and the return travel from that place at the end of the workday. However where an employee performs his principal activity

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[47] Senator Cooper, after explaining that the "principal" activities referred to include activities which are an integral part of a "principal" activity (Senate Report, pp. 47, 48), that is, those which "are indispensable to the performance of the productive work," summarized this provision as it appeared in the Senate Bill by stating: "We have clearly eliminated from compensation walking, traveling, riding, and other activities which are not an integral part of the employment for which the worker is employer." 93 Cong. Rec. 2299.

at various places (common examples would be a telephone lineman, a "trouble-shooter" in a manufacturing plant, a meter reader, or an exterminator) the travel between those places is not travel of the nature described in this section, and the Portal Act has not significance in determining whether the travel time should be counted as time worked.

(f) Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered "preliminary" or "postliminary" activities are (1) walking or riding by an employee between the plant gate and the employee's lathe, workbench or other actual place of performance of his principal activity or activities; (2) riding on buses between a town and an outlying mine or factory where the employee is employed; and (3) riding on buses or trains from a logging camp to a particular site at which the logging operations are actually being conducted.[48]

(g) Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered "preliminary" or "postliminary" activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.[49]

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[48] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2121, 2182, 3263.

[49] See Senate Report p. 47. Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity". See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298. See also paragraph (h) of this section and § 790.8(c). This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

(h) As indicated above, an activity which is a "preliminary" or "postliminary" activity under one set of circumstances may be a principal activity under other conditions.[50] This may be illustrated by the following example: Waiting before the time established for the commencement of work would be regarded as a preliminary activity when the employee voluntarily arrives at his place of employment earlier than he is either required or expected to arrive. Where, however, an employee is required by his employer to report at a particular hour at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities.[51] The difference in the two situations is that in the second the employee was engaged to wait while in the first the employee waited to be engaged.[52]

§ 790.8 "Principal" activities.

(a) An employer's liabilities and obligations under the Fair Labor Standards Act with respect to the "principal" activities his employees are employed to perform are not changed in any way by section 4 of the Portal Act, and time devoted to such activities must be taken into account in computing hours worked to the same extent as it would if the Portal Act had not been enacted.[53] But before it can be determined whether an activity is "preliminary or

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[50] See paragraph (b) of this section. See also footnote 49.

[51] Colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2298.

[52] See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 7 WHR 1165.

[53] See § § 790.4 through 790.6 of this bulletin and part 785 of this chapter, which discusses the principles for determining hours worked under the Fair Labor Standards Act, as amended.

postliminary to (the) principal activity or activities" which the employee is employed to perform, it is generally necessary to determine what are such "principal" activities.[54]

The use by Congress of the plural form "activities" in the statute makes it clear that in order for an activity to be a "principal" activity, it need not be predominant in some way over all other activities engaged in by the employee in performing his job;[55] rather, an employee may, for purposes of the Portal-to-Portal Act be engaged in several "principal" activities during the workday. The "principal" activities referred to in the statute are activities which the employee is "employed to perform";[56] they do not include noncompensable "walking, riding, or traveling" of the type referred to in section 4 of the Act.[57] Several guides to determine what constitute "principal activities" was suggested in the legislative debates. One of the members of the conference committee stated to the House of Representatives that "the realities of industrial life," rather than arbitrary standards, "are intended to be applied in defining the term 'principal activity or activities'," and that these words should "be interpreted with due regard to generally established compensation practices in the particular industry and trade."[58] The legislative history further indicates that Congress intended the words "principal activities" to be construed

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[54] Although certain "preliminary" and "postliminary" activities are expressly mentioned in the statute (see § 790.7(b)), they are described with reference to the place where principal activities are performed. Even as to these activities, therefore, identification of certain other activities as "principal" activities is necessary.

[55] Cf. *Edward F. Allison Co., Inc.* v. *Commissioner of Internal Revenue*, 63 F. (2d) 553 (C.C.A. 8, 1933).

[56] Cf. *Armour & Co.* v. *Wantock*, 323 U.S. 126, 132-134; *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 136-137.

[57] See statement of Senator Cooper, 93 Cong. Rec. 2297.

[58] Remarks of Representative Walter, 93 Cong. Rec. 4389. See also statements of Senator Cooper, 93 Cong. Rec. 2297, 2299.

liberally in the light of the foregoing principles to include any work of consequence performed for an employer, no matter when the work is performed.[59] A majority member of the committee which introduced this language into the bill explained to the Senate that it was considered "sufficiently broad to embrace within its terms such activities as are indispensable to the performance of productive work."[60]

(b) The term "principal activities" includes all activities which are an integral part of a principal activity.[61] Two examples of what is meant by an integral part of a principal activity are found in the Report of the Judiciary Committee of the Senate on the Portal-to-Portal Bill.[62] They are the following:

(1) In connection with the operation of a lathe an employee will frequently at the commencement of his workday oil, grease or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.

(2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the work-benches of other employees and gets machines in

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[59] See statements of Senator Cooper, 93 Cong. Rec. 2296-2300. See also Senate Report, p. 48, and the President's message to Congress on approval of the Portal Act, May 14, 1947 (93 Cong. Rec. 5281).

[60] See statement of Senator Cooper, 93 Cong. Rec. 2299.

[61] Senate Report, p. 48; statements of Senator Cooper, 93 Cong. Rec. 2297-2299.

[62] As stated in the Conference Report (p. 12), by Representative Gwynne in the House of Representatives (93 Cong. Rec. 4388) and by Senator Wiley in the Senate (93 Cong. Rec. 4371), the language of the provision here involved follows that of the Senate bill.

readiness for operation by other employees, such activities are among the principal activities of such employee.

Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.[63]

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance.[64] If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes,[65] changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity.[66] On the other hand, if changing clothes is merely a convenience to the employee and not directly related

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[63] Statement of Senator Cooper, 93 Cong. Rec. 2297; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350. The fact that a period of 30 minutes was mentioned in the second example given by the committee does not mean that a different rule would apply where such preparatory activities take less time to perform. In a colloquy between Senators McGrath and Cooper, 93 Cong. Rec. 2298, Senator Cooper stated that "There was no definite purpose in using the words '30 minutes' instead of 15 or 10 minutes or 5 minutes or any other number of minutes." In reply to questions, he indicated that any amount of time spent in preparatory activities of the types referred to in the examples would be regarded as a part of the employee's principal activity and within the compensable workday. Cf. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 693.

[64] See statements of Senator Cooper, 93 Cong. Rec. 2297-2299, 2377; colloquy between Senators Barkley and Cooper, 93 Cong. Rec. 2350.

[65] Such a situation may exist where the changing of clothes on the employer's premises is required by law, by rules of the employer, or by the nature of the work. See footnote 49.

[66] See colloquy between Senators Cooper and McGrath, 93 Cong. Rec. 2297-2298.

to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a principal part of the activity. However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.[67]

2. Part 785 and Title 29 of the Code of Federal Regulations provides, in relevant part:

SUBPART A

GENERAL CONSIDERATIONS

§ 785.1 Introductory statement.

Section 6 of the Fair Labor Standards Act of 1938 (29 U.S.C. 206) requires that each employee, not specifically exempted, who is engaged in commerce, or in the production of goods for commerce, or who is employed in an enterprise engaged in commerce, or in the production of goods for commerce receive a specified minimum wage. Section 7 of the Act (29 U.S.C. 207) provides that persons may not be employed for more than a stated number of hours a week without receiving at least one and one-half times their regular rate of pay for the overtime hours. The amount of money an employee should receive cannot be determined without knowing the number of hours worked. This part discusses the principles involved in determining what constitutes working time. It also seeks to apply these principles to situations that frequently arise. It cannot include every possible situation. No inference should be drawn from the fact that a subject or an illustration is omitted. If doubt arises inquiries should be sent to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, DC 20210, or to any area or Regional Office of the Division.

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[67] See Senate Report, p. 47; statements of Senator Donnell, 93 Cong. Rec. 2305-2306, 2362; statements of Senator Cooper, 93 Cong. Rec. 2296-2297, 2298.

SUBPART B
PRINCIPLES FOR DETERMINATION OF HOURS WORKED

§ 785.9 Statutory exemptions.

(a) The Portal-to-Portal Act. The Portal-to-Portal Act (secs. 1-13, 61 Stat. 84-89, 29 U.S.C. 251-262) eliminates from working time certain travel and walking time and other similar "preliminary" and "postliminary" activities performed "prior" or "subsequent" to the "workday" that are not made compensable by contract, custom, or practice. It should be noted that "preliminary" activities do not include "principal" activities. See §§ 790.6 to 790.8 of this chapter. Section 4 of the Portal-to-Portal Act does not affect the computation of hours worked within the "workday". "Workday" in general, means the period between "the time on any particular workday at which such employee commences (his) principal activity or activities" and "the time on any particular workday at which he ceases such principal activity or activities." The "workday" may thus be longer than the employee's scheduled shift, hours, tour of duty, or time on the production line. Also, its duration may vary from day to day depending upon when the employee commences or ceases his "principal" activities. With respect to time spent in any "preliminary" or "postliminary" activity compensable by contract, custom, or practice, the Portal-to-Portal Act requires that such time must also be counted for purposes of the Fair Labor Standards Act. There are, however, limitations on this requirement. The "preliminary" or "postliminary" activity in question must be engaged in during the portion of the day with respect to which it is made compensable by the contract, custom, or practice. Also, only the amount of time allowed by the contract or under the custom or practice is required to be counted. If, for example, the time allowed is 15 minutes but the activity takes 25 minutes, the time to be added to other working time would be limited to 15 minutes. (*Galvin* v. *National Biscuit Co.*, 82

F. Supp. 535 (S.D.N.Y. 1949) appeal dismissed, 177 F. 2d 963 (C.A. 2, 1949))

(b) Section 3(o) of the Fair Labor Standards Act. Section 3(o) gives statutory effect, as explained in § 785.26, to the exclusion from measured working time of certain clothes-changing and washing time at the beginning or the end of the workday by the parties to collective bargaining agreements.

SUBPART C
APPLICATION OF PRINCIPLES
WAITING TIME

§ 785.14 General.

Whether waiting time is time worked under the Act depends upon particular circumstances. The determination involves "scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the circumstances. Facts may show that the employee was engaged to wait or they may show that he waited to be engaged." (*Skidmore* v. *Swift*, 323 U.S. 134 (1944)) Such questions "must be determined in accordance with common sense and the general concept of work or employment." (*Central Mo. Tel. Co.* v. *Conwell*, 170 F. 2d 641 (C.A. 8, 1948))

§ 785.15 On duty.

A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity. The rule also applies to employees who work away from the plant. For example, a repair man is working while he waits for his

employer's customer to get the premises in readiness. The time is worktime even though the employee is allowed to leave the premises or the job site during such periods of inactivity. The periods during which these occur are unpredictable. They are usually of short duration. In either event the employee is unable to use the time effectively for his own purposes. It belongs to and is controlled by the employer. In all of these cases waiting is an integral part of the job. The employee is engaged to wait. (See: *Skidmore* v. *Swift*, 323 U.S. 134, 137 (1944); *Wright* v. *Carrigg*, 275 F. 2d 448, 14 W.H. Cases (C.A. 4, 1960); *Mitchell* v. *Wigger*, 39 Labor Cases, para. 66,278, 14 W.H. Cases 534 (D.N.M. 1960); *Mitchell* v. *Nicholson*, 179 F. Supp, 292,14 W.H. Cases 487 (W.D.N.C. 1959))

§ 785.16 Off duty.

(a) General. Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked. He is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived. Whether the time is long enough to enable him to use the time effectively for his own purposes depends upon all of the facts and circumstances of the case.

(b) Truck drivers; specific examples. A truck driver who has to wait at or near the job site for goods to be loaded is working during the loading period. If the driver reaches his destination and while awaiting the return trip is required to take care of his employer's property, he is also working while waiting. In both cases the employee is engaged to wait. Waiting is an integral part of the job. On the other hand, for example, if the truck driver is sent from Washington, DC to New York City, leaving at 6 a.m. and arriving at 12 noon, and

is completely and specifically relieved from all duty until 6 p.m. when he again goes on duty for the return trip the idle time is not working time. He is waiting to be engaged. (*Skidmore* v. *Swift*, 323 U.S. 134, 137 (1944); *Walling* v. *Dunbar Transfer & Storage*, 3 W.H. Cases 284; 7 Labor Cases para. 61,565 (W.D. Tenn. 1943); *Gifford* v. *Chapman*, 6 W.H. Cases 806; 12 Labor Cases para. 63,661 (W.D. Okla., 1947); *Thompson* v. *Daugherty*, 40 Supp. 279 (D. Md. 1941)).

§ 785.17 On-call time.

An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call". An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call. (*Armour & Co.* v. *Wantock*, 323 U.S. 126 (1944); *Handler* v. *Thrasher*, 191 F. 2d 120 (C.A. 10, 1951); *Walling* v. *Bank of Waynesboro, Georgia*, 61 F. Supp. 384 (S.D. Ga. 1945))

SUBPART C
APPLICATION OF PRINCIPLES
REST AND MEAL PERIODS

§ 785.18 Rest.

Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time. (*Mitchell* v. *Greinetz*, 235 F. 2d 621, 13 W.H. Cases 3 (C.A. 10, 1956); *Ballard* v. *Consolidated Steel Corp., Ltd.*, 61 F. Supp. 996 (S.D. Cal. 1945))

§ 785.19 Meal.

(a) Bona fide meal periods. Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. (*Culkin* v. *Glenn L. Martin, Nebraska Co.*, 97 F. Supp. 661 (D. Neb. 1951), aff'd 197 F. 2d 981 (C.A. 8, 1952), cert. denied 344 U.S. 888 (1952); *Thompson* v. *Stock & Sons, Inc.*, 93 F. Supp. 213 (E.D. Mich 1950), aff'd 194 F. 2d 493 (C.A. 6, 1952); *Biggs* v. *Joshua Hendy Corp.*, 183 F. 2d 515 (C. A. 9, 1950), 187 F. 2d 447 (C.A. 9, 1951); *Walling* v. *Dunbar Transfer & Storage Co.*, 3 W.H. Cases 284; 7 Labor Cases para. 61.565 (W.D. Tenn. 1943); *Lofton* v. *Seneca Coal and Coke Co.*, 2 W.H. Cases 669; 6 Labor Cases para. 61,271 (N.D. Okla. 1942); aff'd 136 F. 2d 359 (C.A. 10, 1943); cert. denied 320 U.S. 772 (1943); *Mitchell* v. *Tampa Cigar Co.*, 36 Labor Cases para. 65, 198, 14 W.H. Cases 38 (S.D. Fla. 1959); *Douglass* v. *Hurwitz Co.*, 145 F. Supp. 29, 13 W.H. Cases (E.D. Pa. 1956))

(b) Where no permission to leave premises. It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

SUBPART C
APPLICATION OF PRINCIPLES
PREPARATORY AND CONCLUDING ACTIVITIES

§ 785.24 Principles noted in Portal-to-Portal Bulletin.

In November, 1947, the Administrator issued the Portal-to-Portal Bulletin (part 790 of this chapter). In dealing with this subject, § 790.8 (b) and (c) of this chapter said:

(b) The term "principal activities" includes all activities which are an integral part of a principal activity. Two examples of what is meant by an integral part of a principal activity are found in the report of the Judiciary Committee of the Senate on the Portal-to-Portal bill. They are the following:

> (1) In connection with the operation of a lathe, an employee will frequently, at the commencement of his workday, oil, grease, or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity, and are included within such term.
>
> (2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the workbenches of other employees and gets machines in readiness for operation by other employees, such activities are among the principal activities of such employee.

Such preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract.

(c) Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance. If an employee in a chemical plant, for example, cannot perform his principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the workday would be an integral part of the employee's principal activity. On the other hand, if changing clothes is merely a convenience to the employee and not directly related to his principal activities, it would be considered as a "preliminary" or "postliminary" activity rather than a

principal part of the activity. However, activities such as checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities.

§ 785.25 Illustrative U.S. Supreme Court decisions.

These principles have guided the Administrator in the enforcement of the Act. Two cases decided by the U.S. Supreme Court further illustrate the types of activities which are considered an integral part of the employees' jobs. In one, employees changed their clothes and took showers in a battery plant where the manufacturing process involved the extensive use of caustic and toxic materials. (*Steiner* v. *Mitchell*, 350 U.S. 247 (1956).) In another case, knifemen in a meatpacking plant sharpened their knives before and after their scheduled workday (*Mitchell* v. *King Packing Co.*, 350 U.S. 260 (1956)). In both cases the Supreme Court held that these activities are an integral and indispensable part of the employees' principal activities.

§ 785.26 Section 3(o) of the Fair Labor Standards Act.

Section 3(o) of the Act provides an exception to the general rule for employees under collective bargaining agreements. This section provides for the exclusion from hours worked of time spent by an employee in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee. During any week in which such clothes-changing or washing time was not so excluded, it must be counted as hours worked if the changing of clothes or washing is indispensable to the performance of the employee's work or is required by law or by the rules of the employer. The same would be true if the changing of

clothes or washing was a preliminary or postliminary activity compensable by contract, custom, or practice as provided by section 4 of the Portal-to-Portal Act, and as discussed in § 785.9 and part 790 of this chapter.

SUBPART C
APPLICATION OF PRINCIPLES
TRAVELTIME

§ 785.34 Effect of section 4 of the Portal-to-Portal Act.

The Portal Act provides in section 4(a) that except as provided in subsection (b) no employer shall be liable for the failure to pay the minimum wage or overtime compensation for time spent in "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." Subsection (b) provides that the employer shall not be relieved from liability if the activity is compensable by express contract or by custom or practice not inconsistent with an express contract. Thus traveltime at the commencement or cessation of the workday which was originally considered as working time under the Fair Labor Standards Act (such as underground travel in mines or walking from time clock to work-bench) need not be counted as working time unless it is compensable by contract, custom or practice. If compensable by express contract or by custom or practice not inconsistent with an express contract, such traveltime must be counted in computing hours worked. However, ordinary travel from home to work (see § 785.35) need not be counted as hours worked even if the employer agrees to pay for it. (See *Tennessee Coal, Iron & RR. Co.* v. *Musecoda Local*, 321 U.S. 590 (1946); *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 690 (1946); *Walling* v.

Anaconda Copper Mining Co., 66 F. Supp. 913 (D. Mont. (1946).

§ 785.35 Home to work; ordinary situation.

An employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. This is true whether he works at a fixed location or at different job sites. Normal travel from home to work is not worktime.

§ 785.38 Travel that is all in the day's work.

Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked. (*Walling* v. *Mid-Continent Pipe Line Co.*, 143 F. 2d 308 (C. A. 10, 1944))

SUBPART D

RECORDING WORKING TIME

§ 785.47 Where records show insubstantial or insignificant periods of time.

In recording working time under the Act, insubstantial or insignificant periods of time beyond the scheduled working

hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded. The courts have held that such trifles are de minimis. (*Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)) This rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him. See *Glenn L. Martin Nebraska Co.* v. *Culkin*, 197 F. 2d 981, 987 (C.A. 8, 1952), cert. denied, 344 U.S. 866 (1952), rehearing denied, 344 U.S. 888 (1952), holding that working time amounting to $ 1 of additional compensation a week is "not a trivial matter to a workingman," and was not de minimis; *Addison* v. *Huron Stevedoring Corp.*, 204 F. 2d 88, 95 (C.A. 2, 1953), cert. denied 346 U.S. 877, holding that "To disregard workweeks for which less than a dollar is due will produce capricious and unfair results." *Hawkins* v. *E. I. du Pont de Nemours & Co.*, 12 W.H. Cases 448, 27 Labor Cases, para. 69,094 (E.D. Va., 1955), holding that 10 minutes a day is not de minimis.

3. Interpretative Bulletin No. 13,* provides in relevant part :

INTERPRETATIVE BULLETIN NO. 13

Determination of Hours for Which Employees Are Entitled to Compensation Under the Fair Labor Standards Act of 1938

Originally issued July, 1939. Paragraph 15 revised October 1939 and October 1940. Revised November 1940.

General

1. The accurate determination of what constitutes hours worked is essential in order to establish whether the minimum wage and maximum hours requirements of Sections 6 and 7 of the Act have been satisfied. This bulletin is intended to indicate the course which the Administrator will follow with respect to the determination of employees' hours of work in the performance of his administrative duties under the Act, unless he is directed otherwise by the authoritative rulings of the courts or unless he shall subsequently decide that his interpretation is incorrect. The manner of computing minimum wages and overtime compensation which is discussed in Interpretative Bulletin 4 is not within the scope of this bulletin.

2. The Act contains no express guide as to the manner of computing hours of work and reasonable rules must be adopted for purposes of enforcement of the wage and hour standards. As a general rule, hours worked will include (1) all time during which an employee is required to be on duty or to be on the employer's premises or to be at a prescribed workplace, and (2) all time during which an employee is

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* As set forth in Bureau of National Affairs, Wage and Hour Manual 172-173 (1944).

suffered or permitted to work whether or not he is required to do so. In the large majority of cases, the determination of an employee's working hours will be easily calculable under this formula and will include in the ordinary case all hours from the beginning of the workday to its end with the exception of periods when the employee is relieved of all duties for the purpose of eating meals.

(4)

Supreme Court, U.S.
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No. 04-66

In the Supreme Court of the United States

ABDELA TUM, *et al.*,

Petitioners,

v.

BARBER FOODS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE EMPLOYMENT LAW CENTER, AND THE NATIONAL EMPLOYMENT LAW PROJECT IN SUPPORT OF PETITIONER

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Brief *Amici Curiae* of National Employment Lawyers Association, Legal Aid Society-Employment Law Center, and National Employment Law Project in Support of Petitioner

The National Employment Lawyers Association ("NELA"), the Legal Aid Society-Employment Law Center ("LAS-ELC"), and the National Employment Law Project ("NELP") file this Brief as *Amici Curiae* in support of the Petitioner. NELA, LAS-ELC, and NELP request reversal of the First Circuit's decision. Travel time after donning of necessary safety equipment, as well as time spent waiting at required safety distribution stations, should be compensable under 29 U.S.C. §§ 206, 207 of the Fair Labor Standards Act ("FLSA"), as amended by 29 U.S.C. § 254 of the Portal-to-Portal Act ("Portal Act").

INTEREST OF *AMICI CURIAE*

NELA, LAS-ELC, and NELP file this *amicus curiae* brief with the consent of all parties.[1]

NELA was founded in 1985 and is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment, and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to

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[1] The consents of the parties have been filed with the Clerk of the Court. In compliance with Rule 37.6 of this Court, *amici curiae* NELA, LAS-ELC, and NELP state that no counsel for either party authored any portion of this brief. No persons other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

protect the rights of its members' clients and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics, and judicial integrity.

LAS-ELC is a non-profit public interest law firm whose mission is to protect, preserve, and advance the workplace rights of individuals from traditionally under-represented communities. Since 1970, LAS-ELC has represented plaintiffs in cases involving the rights of employees in the workplace, particularly those cases of special import to communities of color, women, recent immigrants, individuals with disabilities, and the working poor, and specializes in, among other areas of the law, wage and hour rights.

NELP is a non-profit legal organization with over 30 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of employment laws, regardless of an individual's status as an immigrant, or as a worker in a nonstandard relationship such as part-time, temporary, or subcontracted work. NELP's area of expertise includes the workplace rights of documented and undocumented immigrant workers under federal employment and labor laws, with an emphasis on wage and hour and health and safety rights. NELP has litigated directly and participated as *amicus* in numerous cases addressing the rights of immigrant workers under the FLSA and the National Labor Relations Act. NELP also provides legal assistance to labor unions and immigrant worker organizations regarding the rights of immigrant workers. This case is important to NELP and its constituents because it has the potential to affect many low-income workers, including day laborers, poultry and meatpacking workers, and construction workers.

Based on their extensive experience and expertise in litigating employment cases, including cases brought under the FLSA, NELA, LAS-ELC, and NELP believe that to achieve the goals of the FLSA, employees must be paid for all work performed between their first and last principal activities of the day, including walk and wait time. Allowing employers to impose the costs of non-Portal Act pre-shift and post-shift walk and wait time on employees when the amount of that time is entirely within the control of the employer violates the fundamental purposes of the FLSA by increasing the time-burdens facing workers and their families in numerous sectors of the economy and negatively impacting their health, efficiency, and general welfare. Requiring compensation for this time will eliminate such abuses and place the cost of workplace rules and business decisions where it belongs—on employers—and will thereby serve the goals of the FLSA.

SUMMARY OF ARGUMENT

Congress passed the Fair Labor Standards Act of 1938 ("FLSA") in order to eliminate abusive and exploitative labor conditions that adversely impacted "the health, efficiency, and general well-being of workers." 29 U.S.C. § 202. The Portal-to-Portal Act reaffirmed this goal by eliminating liability for certain pre- and post-shift activities, and clearly establishing that employees must be paid for all hours of work performed during the workday. The Portal-to-Portal Act plainly defined the workday to include all hours between an employee's first and last principal activities. 29 U.S.C. § 254(a).

Under the Portal-to-Portal Act's first principal activity rule, once the factual issue as to whether an activity is a principal activity or is integral and indispensable to a principal activity has been answered, any subsequent walk or travel time is compensable. There is no need, nor any

legal basis, for making a further determination that the activity starts or does not start the workday. Similarly with respect to wait time, once the factual issue as to whether an employee is "engaged to wait" incident to performing his or her first principal activity, there is no basis for concluding that the wait-time is nevertheless excluded from compensability by the Portal-to-Portal Act.

This bright-line definition of the workday has been applied throughout the economy in analyzing the compensability of travel and walk time occurring prior to the established shift, but after an employee's first principal activity or subsequent to the established shift but prior to an employee's last principal activity. Similarly, where for reasons beyond their control, such as workplace rules or the realities of the industrial context, employees are required to wait before they can perform their first principal activity, they are engaged to wait and must be compensated. Construing the FLSA and the Portal-to-Portal Act to permit such walk and wait time to go uncompensated in some instances, such as where the first principal activity involves the donning and doffing of required safety equipment, will upset the established law in other contexts, heightening litigation risks and leading to uncertainty in many industries where expectations concerning walk, travel, and wait time have long been settled. The absence of any principle guiding the determination of which compensable activities begin the work day and which do not will further aggravate these problems.

The first principal activity rule provides a bright-line test which simplifies compliance and enforcement, decreases uncertainty, and reduces litigation risks and costs. At the same time, this rule conforms with the plain language of the Portal-to-Portal Act, and is consistent with established law and regulations. Unlike the alternative rule proposed by the *Tum* concurrence, *Tum v. Barber Foods, Inc.*, 360 F.3d 274, 284 (1st Cir. 2004) (Boudin, J.,

concurring), this bright-line test serves the interests of both employers and employees, as well as the larger economic and societal interests of encouraging compliance with the law and promoting economic efficiency and productivity in business planning and decision-making, interests which are among the most important goals of the FLSA and the Portal-to-Portal Act.

ARGUMENT

I. THE FAIR-LABOR STANDARDS ACT AND THE PORTAL-TO-PORTAL ACT ESTABLISH A FIRST PRINCIPAL ACTIVITY RULE GOVERNING THE COMPENSABILITY OF WALK AND WAIT TIME.

The FLSA was passed in 1938 to eliminate labor conditions "detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency, and general well-being of workers." 29 U.S.C. § 202. The Portal to Portal Act of 1947 ("Portal Act"), while creating certain exceptions to the FLSA, made no change to this fundamental policy. 29 C.F.R. § 790.2. The two acts carry out this national policy by guaranteeing that employees are paid for all "hours worked" within the workday.

A. *The First Principal Activity Rule Requires Compensation for Walk and Travel Time Subsequent to an Employee's First Principal Activity and Prior to the Last Principal Activity of the Day.*

Section 4 of the Portal Act relieves the employer of the obligation to pay employees for travel time, but only where the travel time occurs "either prior to the time on any particular workday at which [the] employee commences, or subsequent to the time on any particular workday at which he ceases [his or her] principal activity or activities." 29

U.S.C. § 254(a). The Portal Act does not affect the compensability of activities performed within the "workday," and does not change the rule that travel "all in a day's work," that is, travel time within the workday, is compensable as "hours worked." *See* 29 C.F.R. § 785.38; *see also* 29 C.F.R. § 790.6 (The Portal Act "[has] nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by the employee during [the workday]."). The Portal Act thus establishes a bright line rule that the workday begins with the start of an employee's first principal activity and ends with the completion of the employee's last principal activity. *See* 29 C.F.R. §§ 790.6(a), (b) (defining workday for purposes of the Portal Act). Any travel time occurring after the first principal activity and prior to the last principal activity is compensable under the FLSA and remains so under the Portal Act.

In *Steiner v. Mitchell*, 350 U.S. 247 (1956), this Court held that "the term 'principal activity or activities' in Section 4 [of the Portal Act] embraces all activities which are an integral and indispensable part of the principal activities." *Id.* at 252-53 (internal quotation marks omitted). Under *Steiner*, the donning and doffing of necessary protective gear is an integral and indispensable part of an employee's principal activities. Thus, when the donning or doffing of necessary protective gear is the first or last activity in which the employee engages, this serves to begin or end the workday, and thereby limits the applicability of Section 4 of the Portal Act. Consequently, any travel or walk time that occurs after one of these activities is "all in a day's work," and is compensable under the FLSA as amended by the Portal Act.

B. *The First Principal Activity Rule Requires Compensation for Wait Time Incident to an Employee's First and Last Principal Activities of the Day.*

Similarly, Section 4 of the Portal Act excludes pre- or post-shift waiting time from compensability only where that time occurs prior to the first principal activity or subsequent to the last principal activity, but has no effect where the wait time is an integral part of the principal activities. 29 U.S.C. § 254(a); *see* 29 C.F.R. § 790.7(h) (wait time may be regarded as preliminary or postliminary, or may be "an integral part of the employee's principal activities" depending on circumstances); *id.* § 790.8(a) (Portal Act has no effect on compensability of principal activities). Thus, under the Portal Act's bright-line first principal activity test for determining the boundaries of the compensable workday, wait time which is integral and indispensable to an employee's first or last principal activity of the day is outside the scope of Section 4 and is compensable.

In *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944), this Court found wait time compensable under the FLSA where the employee was "engaged to wait" rather than "wai[ting] to be engaged." This distinction is currently codified in U.S. Department of Labor regulations concerning "on duty," "off duty" and "on call" time. *See* 29 C.F.R. §§ 785.15-785.17. Under these regulations, the determinative factor in whether an employee is "engaged to wait" is whether waiting is an "integral part" of a principal activity, such that the time spent waiting "belongs to and is controlled by the employer," *id.* § 785.15, and is consequently "beyond [the employee's] control." *Id.* § 790.7(h). In cases where donning necessary safety equipment qualifies as the first principal activity that starts the compensable work day, time spent waiting for that equipment at

distribution stations is an integral part of donning it, is controlled by the employer, and cannot effectively be used for the employee's own purposes, and is therefore compensable under the FLSA and the Portal Act.

C. *The First Principal Activity Test Is Not Limited by the De Minimis Rule.*

Pre-shift and post-shift activities that are integral and indispensable to an employee's principal activities serve to trigger the workday for purposes of Section 4, even where the time spent on each activity, viewed in isolation, is *de minimis*. The *de minimis* concept applies to relieve the employer of liability for otherwise compensable time which, in the aggregate, is negligible, and where, "in light of the realities of the industrial world," computation of the time is difficult or impossible. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946). However, a discrete activity cannot be deemed *de minimis* in isolation. Rather, time can only be disregarded under this theory when it is *de minimis* in the aggregate. *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984). That is, the determination of whether the amount of compensable but uncompensated time is *de minimis* can be made only after it has been determined which time is compensable. Thus, the questions of whether (1) wait time that occurs in connection with compensable donning and doffing, and (2) travel or walk time which occurs subsequent to compensable donning are themselves compensable must be answered before the *de minimis* rule can be applied. For this reason, these questions cannot be answered by reference to the *de minimis* rule. To make a *de minimis* determination with respect to an isolated activity, and thereby to determine whether travel or wait time is compensable, as the court did in *Tum*, puts the cart before the horse.

II. THE FIRST PRINCIPAL ACTIVITY RULE HAS CONSISTENTLY BEEN APPLIED TO DETERMINE THE COMPENSABILITY OF TRAVEL, WALK, AND WAIT TIME, AND INFORMS PRACTICE AND EXPECTATIONS IN OTHER INDUSTRIAL CONTEXTS.

A bright line rule that donning and doffing necessary safety equipment (or, if applicable, waiting in line to do so) is the first principal activity and that all subsequent time and attendant wait time is compensable as part of the ordinary workday is consistent with settled law concerning travel and wait time in a wide variety of industrial contexts. Because the first principal activity test has been so consistently applied in nearly every case concerning travel and wait time, it informs the practice and expectations of employers and employees. Furthermore, because there is no principled basis for distinguishing these other contexts from the situation here, rejection of the first principal activity test in this case will upset these expectations and lead to great uncertainty concerning the rights and obligations of employers throughout the economy.

A. *Existing Law Makes Travel and Walking Time Compensable Where It Occurs Subsequent to the First Principal Activity*

Numerous cases outside the protective gear context address the question of when pre-shift travel time is compensable and when it can be excluded under Section 4 of the Portal Act. These cases consistently hold that where principal activities are performed prior to the start of an employee's shift, any subsequent travel time must be compensated.

In a recent line of cases concerning the construction industry, courts have addressed the question of whether travel between the employer's shop or yard and the job site

at the beginning and end of the workday must be compensated. This question arises when employees are required to report to the yard prior to proceeding to the job-site. Nearly every court has held that where some "work," however minimal, is performed at the yard, including work activities which are integral and indispensable to a principal activity, the travel must be compensated. Examples of such principal activities have included completing paperwork, loading tools, performing maintenance on trucks, and removing debris from trucks at the end of the day. *See, e.g., Herman v. Rich Kramer Const., Inc.*, 163 F.3d 602, 1998 WL 664622 (8th Cir. 1998) (unpublished table decision) (travel time compensable where construction foremen loaded trucks, received crew assignments, and studied blueprints prior to traveling from employer's shop to job site and filled out time-sheets, unloaded and locked trucks, and secured equipment upon return to shop); *O'Brien v. Encotech Const.*, No. 00 CV 1133, 2004 WL 609798, *4 (N.D. Ill. Mar. 23, 2004) ("on any day that the [employee] performed preparation or cleanup that constituted a 'principal activity,' not just 'preliminary' or 'postliminary' activity . . . , the [employee's] travel time to a job site after preparation or from a job site before cleanup would be [compensable]."); *Ladegaard v. Hard Rock Concrete Cutters, Inc.*, No. 00 C 5755, 2004 WL 1882449, *3 (N.D. Ill. Aug. 18 2004) (same); *Breen v. Concrete By Wagner, Inc.*, No. 98 C 3611, 1999 WL 1016267, *12 (N.D. Ill. Nov. 4, 1999) (same).

Likewise, in the context of a temporary labor agency, where employees meet at a central dispatch hall to receive training or instruction or to perform other activities prior to being dispatched for the day's work, travel time from the dispatch hall to the place of work is compensable. *See, e.g., Preston v. Settle Down Enterprises, Inc.*, 90 F. Supp. 2d 1267, 1281 (N.D. Ga. 2000). *But see Powell v. Northwestern Resources Co.*, No. 03-S1244, 2004 WL 1576572

(5th Cir. Jul 15, 2004) (travel time not compensable where pre-travel activity was not "work" because not in the ordinary course of business and not done for the benefit of the employer). However, where the employee performed no work at the dispatch hall prior to being dispatched, travel time from the hall was not compensable. *Preston*, 90 F. Supp. 2d at 1281.

Similar results have been reached with respect to travel from a designated meeting place in other industries. *See, e.g., Dole v. Enduro Plumbing*, No. 88 7041-RMT, 1990 WL 252270, *4-5 (C.D. Cal. Oct. 16, 1990) (plumbers' travel time compensable where workers required to report to designated meeting place, perform work, and carry tools to job site); *Marshall v. Boyd*, No. LR C 77-4, 1979 WL 1922, *3 (E.D. Ark. Apr. 4, 1979) ("Where the [inventory control] employees are required to report to a meeting place to receive instructions, to perform other work, or to pick up and to carry tools or materials, the travel from the designated meeting place to the work place in [sic] part of the day's work and must be counted as hours worked."); *Mitchell v. Mitchell Truck Line, Inc.*, 286 F.2d 721 (5th Cir. 1961) (travel time of truck drivers between truck yard and material plant compensable where truck was serviced in yard prior to travel to material plant and cleaned and refueled upon return to the yard).

Another line of cases deals with the compensability of travel time from service workers' homes to their first job assignments each day. In these cases, courts have held that where the employee performs some required compensable work activity at home prior to the first service call, such as initiating or completing paperwork, scheduling appointments with customers, or receiving and inventorying supplies, the subsequent travel time to the customer's location is compensable. *See, e.g., Dooley v. Liberty Mut. Ins. Co.*, 307 F. Supp. 2d 234, 242-43 (D. Mass. 2004)

("Because the plaintiffs' drive to the first appraisal site does not occur 'prior to the time [the] employee commences [his or her] principal activity or activities,' the drive is outside the ambit of the Portal-to-Portal Act." (quoting 29 U.S.C. § 254(a)); *Boudreaux v. Banctec, Inc.*, No. Civ. A. 03-2111, 2005 WL 517494, *5 (E.D. La. Feb. 22, 2005) ("[W]hether . . . travel time [from home to first service stop] is compensable depends on whether a principal activity is being performed at home."). In such cases, the compensability of the home to job-site travel time is within the control of the employer, who can require the worker to perform work activities only on employer or customer premises. Moreover, application of the bright-line rule in these cases prevents the employer from avoiding liability for travel time simply by moving pre-travel work from an employer-supplied office to an employee's home office.

Finally, in a line of cases factually quite similar to the donning and doffing cases here, the U.S. Court of Federal Claims and its predecessors have considered whether federal guards and prison personnel must be compensated under the FLSA for walk time to their duty stations after required stops in control rooms or equipment rooms in which equipment integral to their job duties was retrieved. *See Amos v. United States*, 13 Cl. Ct. 442, 449-50 (Cl. Ct. 1987); *see also International Business Investments, Inc. v. United States*, 11 Cl. Ct. 588 (Cl. Ct. 1987); *Whelan Sec. Co., Inc. v. United States*, 7 Cl. Ct. 496 (Cl. Ct. 1985); *Baylor v. United States*, 198 Ct. Cl. 331 (Ct. Cl. 1972).

In all of these cases, travel time that occurs subsequent to an employee's performance of his or her first principal activity or prior to the last principal activity is outside the exclusion of the Portal Act and is compensable. These cases are consistent with the first principal activity rule established by the Portal Act, and show that this rule is well-grounded in the case-law and widely applied to questions of travel and walk time in many contexts.

B. *Under Existing Case-Law, Wait Time Incident to a Principal Activity, Such as Donning or Doffing Required Safety Equipment, is Compensable.*

Established law concerning wait time is likewise consistent with the first principal activity rule. Cases addressing the compensability of pre-shift and post-shift wait time have uniformly held that where waiting is integral to an employee's principal activity and the employee is therefore "engaged to wait," the wait time is compensable even where it occurs prior to or after the work shift.

Numerous courts have recognized that pre-shift wait time must be compensated when an employer requires the employee to be on the premises but is not ready for or able to allow the employee to engage in "productive" work. *See, e.g., Mireles v. Frio Foods*, 899 F.2d 1407 (5th Cir. 1990) (wait time held compensable where employees at frozen foods plant were required to sign in and be on production line but there was a delay in the arrival of produce or a mechanical failure at the plant); *Wales v. Jack M. Berry, Inc.*, 192 F. Supp. 2d 1269 (M.D. Fla. 1999) (pre-shift time spent by agricultural workers waiting for equipment to be available or inspections to occur held compensable); *Sedano v. Mercado*, No. Civ. 92-0052-HB, 1992 WL 454007, *3 (D.N.M. Oct. 8, 1992) ("Time spent . . . waiting in the fields for the fields to dry . . . , for trailers to arrive, or for their employer to prepare to begin the work day is predominately for the benefit of the employer" and is compensable under the FLSA); *Fields v. Luther*, No. JH-84-187S, 1988 WL 59963 (D. Md. May 4, 1988) (time harvest crew sat idle in fields waiting for dew on tomatoes to dry was compensable under the FLSA because it was of no benefit to the plaintiffs to sit there and the employer had required them to be there at that hour); *Brock v. DeWitt*, 633 F. Supp. 892 (W.D. Mo. 1986) (wait time compensable where restaurant workers were required to report to work at specified time

but could not clock in until the employer determined that there was enough business to justify allowing them to do so).

Under these cases, even short periods of time spent waiting prior to the performance of productive work are compensable where the wait resulted from the nature of the work or the realities of the workplace. *Mireles*, 899 F.2d at 1413 (compensability of idle time determined by "engaged to wait" test, not by "reasonableness" of the wait time). These cases thus apply the Portal Act's bright-line rule that when an employee is engaged to wait to perform his or her first principal activity, the wait time is compensable.

C. *Rejecting the Bright-Line Rule in this Case Will Upset Settled Expectations Throughout the Economy.*

As these cases illustrate, courts in nearly every other industry have applied a bright line first principal activity rule in determining the compensability of walk, travel, and wait time. The *Tum* court's rejection of the first principal activity rule in favor of an ill-defined *ad hoc* determination therefore represents a radical departure from existing law, and threatens to jeopardize the settled expectations of both employers and employees under the federal overtime laws.

Tum is wholly inconsistent with established law on the compensability of pre-shift travel time. *Tum* found the donning and doffing of at least some protective equipment to be an integral and indispensable activity. Nevertheless, in finding post-donning walk-time non-compensable, *Tum* comes to precisely the opposite result concerning related walk time from the cases described above, in which some item of compensable work was sufficient to start the workday and take subsequent travel time out of the scope of Section 4 of the Portal Act.

In *Tum*, the court found the first principal activity rule to be "an expansion of the ordinary 'workday' rule." *Tum*, 360 F.3d at 280. As the established law shows, however, the ordinary workday rule applied in nearly every other context is nothing other than the first principal activity rule. That is, *Tum*, rather than the first principal activity rule, represents a substantial departure from existing law. Yet the *Tum* court puts forth no principle or policy that would permit, much less require, such a departure here. While the amounts of time involved in *Tum* were small in comparison with the travel time in the construction and other cases, the federal guard cases involved, if anything, even smaller amounts of time. Moreover, the compensability of travel time or other preliminary or postliminary activities is not determined by reference to the length of time involved. The fact that the travel time in the construction cases was so long does not make it compensable under the statute. *Vega v. Gasper*, 36 F.3d 417, 425 (5th Cir. 1994) (citing 29 C.F.R. § 790.7) (finding two hours each way of travel time on company buses not compensable where no work was performed prior to or during the bus ride). Conversely, the fact that the walk time in the *Tum* case was short does not make it non-compensable.

Similarly, the established case law makes pre-shift wait time compensable where the wait time is part of a principal activity, and there is no principled distinction between that wait time, and the wait time at issue in the instant matter. Like the employees who were compensated in *Mireles* and the other cases discussed above, an employee who is waiting in line to retrieve and don safety equipment is on the employer's premises, is waiting for the employer's benefit, and is not at leisure to use the time as she sees fit. Where donning safety equipment is a principal activity under *Steiner*, and the employee is at the equipment distribution station, ready to perform that activity, but cannot do so "for some reason beyond his control," 29

C.F.R. § 790.7(h) (such as an insufficient number of distribution stations or the presence of a number of employees who also require the equipment), the employee is "engaged to wait," and must be compensated.

The *Tum* rule would upset the settled principle that employees must be paid for wait time whenever they are "engaged to wait." It would find some instances in which an employee was engaged to wait non-compensable because, notwithstanding that finding, the wait time in those instances is preliminary or postliminary activity under the Portal Act. *Tum*, 360 F.3d at 282. Presumably, the same could be said of an employee who arrives at work, and finds that there is nothing for him to do because needed parts are not available or a machine is out of service, although federal regulations require compensation in such circumstances. 29 C.F.R. § 785.15. However, *Tum* provides no basis for distinguishing this clearly compensable situation from one in which employees must wait to don required safety equipment.

If an employee who can watch television, read, and even travel within a reasonable distance of a jobsite premises can be compensated for "wait time" on the grounds that this time is for the benefit of the employer and the employee's freedom is restricted, *see* 29 C.F.R. §§ 785.16-785.17, then surely an employee who is actually on the employer's premises and has no choice to do anything but stand in line and wait for necessary safety equipment her employer requires her to wear is "engaged to wait." Simply put, an employee who must wait in line for necessary safety equipment cannot use this time effectively for her own purposes and should be compensated for this time.

Thus, if this Court affirms *Tum's* holding concerning the compensability of wait and walk time in the donning and doffing context, it will upset the settled case law in innumerable other contexts and industries, and will

introduce uncertainty into current expectations in a wide array of fields in which employees have routinely been compensated for pre- and post-shift travel and wait time.

Accordingly, the same bright line "first principal activity" test should control here as it does in other contexts. Once the donning and doffing at issue is determined not to be covered by the changing clothes provisions of 3(o) or the preliminary and postliminary activity provisions of the Portal Act, there is no basis in the FLSA or the Portal Act for a special donning and doffing exception to the general rule that the first principal activity starts the workday, and there is no basis differentiating donning and doffing from any other integral and indispensable activity for purposes of walk or wait time.

III. THIS COURT SHOULD RECONFIRM THE BRIGHT LINE RULE THAT THE COMPENSABLE WORKDAY BEGINS WITH THE FIRST PRINCIPAL ACTIVITY, WHETHER OR NOT THE TIME FOR THE ACTIVITY IS *DE MINIMIS*.

A. *The First Principal Activity Rule is Simplest for Employers and Regulators to Administer, and Will be Less Subject to Abuse than a Rule Permitting Employers to Carve up the Workday.*

The bright-line "first principal activity" test established by the Portal Act and properly applied by the Ninth Circuit in *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), serves the interests of employers, employees, and regulators alike. It provides clear notice to employers and employees of their rights and obligations under the FLSA and the Portal Act, simplifying both compliance and enforcement. In contrast, the *ad hoc* rule applied in *Tum*, and *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994) ("*Reich II*"), permits some travel time that occurs after an initial

principal activity to be excluded while requiring compensation for other travel time, and requires compensation for wait time in connection with some compensable principal activities but not others. Such a rule will create uncertainty regarding the rights and obligations of employees and employers, and may be subject to manipulation and abuse by employers, thereby undermining the goals of the FLSA.

1. The First Principal Activity Test Provides a Clear Rule that Serves the Interests of All Stakeholders.

The first principal activity rule simply requires that once an employee has begun her compensable work, she must be paid for all subsequent hours worked, including travel time which would otherwise fall under Section 4 of the Portal Act (and hence go uncompensated) if performed before the first compensable activity. It also requires that any time necessarily spent waiting in connection with an employee's first or last principal activities must be compensated. This rule serves employers' interests by encouraging employers to arrange their workplaces efficiently by minimizing the time employees spend on these activities. It serves employees' interests by encouraging employers to make efficient use of their employees' work time. And it serves the wider social and regulatory interest animating the FLSA by ensuring that employers pay the full cost of their business decisions concerning how to arrange their workplaces and business processes.

It was this latter interest that motivated Congress to pass the FLSA in 1938, and it is this stated congressional policy which should be of foremost concern in interpreting these statutes and formulating general rules, as well as in applying the FLSA and the Portal Act to the specific circumstances here. In Section 2 of the FLSA, 29 U.S.C.

§§ 202, Congress expressed its concern about the adverse impact on interstate commerce of employment conditions detrimental to the health, safety and well-being of workers. In particular, Congress was concerned that poor working conditions, including the failure to pay workers for all hours worked, "constitute[d] an unfair method of competition in commerce." *Id.* Thus, it is the policy of the FLSA, as clarified by the Portal Act, to ensure that employees are paid for all work activities performed between their first and last principal activities of the day, particularly where the time spent on those activities is within the control of the employer.

The *Tum* rule improperly would permit employers to start and stop the time clock, and cause employees to go uncompensated for time spent in the service of the employer during the workday, even when the amount of that time is entirely within the employer's control. Where time spent waiting to retrieve required safety equipment and walking after donning is entirely within the control of the employer, it should be compensated. Only the employer can control the arrangement of equipment distribution points, locker rooms, and the production floor to minimize the walk and wait time required for employees to don or doff protective gear and to perform other integral and indispensable pre- and post-shift activities. *See, e.g., Reich v. Monfort, Inc.*, No. 92-M-2450, 1995 WL 817796 (D. Colo. Oct. 19, 1995), aff'd 144 F.3d 1329 (10th Cir. 1998) (noting that wait time for wash stations had been shortened after the employer added more wash stations).

Take, for example, a hypothetical meat processing company that has 100 employees on its production line at

any given time.[2] Each of these employees is required to don a number of pieces of safety and sanitary gear. This employer can structure its operations in a number of different ways that would have a significant impact on the amount of time it takes each employee to retrieve and don this equipment and to travel to her work station after doing so.

Under Scenario A, the employer requires all 100 employees to report to their work stations on the production line at exactly the same time. The employer requires all protective equipment to be obtained from and returned to an equipment distribution station, but provides only one such station. The distribution station is on the opposite side of the production floor from the locker room, where employees go to don the required protective equipment. The employees cannot enter the production floor until they have donned the safety equipment, and must walk around the production floor in order to reach the locker room and don their gear. Once they have donned their protective gear, various employees must obtain other required equipment from separate distribution stations. Thus, upon arrival at work, all employees must wait in line at the single protective equipment distribution station. Once an employee has her protective gear, she must walk around the production floor to the locker rooms to don this equipment. Various employees must then wait in line again to retrieve other required equipment. The employee must then walk back to the opposite side of the plant to enter

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[2] The issues presented by this appeal will affect employees in numerous lines of work, not just those employed in meat or poultry processing plants. Employees who work in refineries, laboratories, power stations, construction sites, chemical plants, clean rooms, plumbing companies, insurance companies, call centers, and may other industrial contexts may be affected by the outcome of this case.

the production floor. At the end of the day, employees must clock out, walk around the production floor to the locker room, doff the protective equipment, wait in line at cleaning stations to clean the equipment, and then again stand in multiple lines to return equipment before they may leave the plant.

Under Scenario B, the employer has multiple equipment distribution stations located just inside the plant entrance where employees can retrieve all of the equipment they need at one time. The locker rooms are directly adjacent to the distribution stations, and the employees enter the production floor directly from the locker rooms. In addition, employee start times are staggered so that everyone is not arriving at the distribution stations at exactly the same time.

Under Scenario A, each of the 100 employees knows that he or she is likely to face long lines and walks in connection with retrieving the safety and sanitary equipment that they must don before they can even enter the production floor. Because tardiness can result in discipline (including termination), these employees have no choice but to arrive at work long before their scheduled "start time" on the production line. If this Court rules that walk and wait time in connection with retrieving necessary safety equipment is not compensable, it is the employees, rather than the employer, who will bear the entire cost of this inefficiency. As noted above, this is contrary to the purpose of the FLSA.

Although the employees have no control over the time spent on pre- and post-shift activities in this scenario, the employer does have a number of choices that could reduce the walk and wait time the employees must endure in connection with the donning and doffing of the required gear. As demonstrated in Scenario B, wait times could be reduced by slightly staggering start times and/or by

providing additional equipment distribution stations, and walk time could be reduced by placing these stations at an efficient location. Even where physical or fiscal constraints make it difficult or costly for the employer to rearrange a plant, it is a simple matter of fairness as well as the sound policy of the FLSA that the employer should bear the cost of its business decisions.

Under the *Tum* rule, an employer has no incentive to make efficient choices to reduce walk and wait time as the costs of these inefficiencies will be borne entirely by its employees. In fact, under the rule proposed by Judge Boudin, *see infra* Part III.B, the employer may have an incentive to make the arrangement inefficient by carving the preparatory activities into discrete units which, in isolation, are *de minimis*, and separating each such activity with uncompensated waiting or walking time. The result is that the employer can unilaterally impose substantial time burdens on employees without having to bear the attendant costs. This is exactly the type of detrimental working condition Congress sought to address when it passed the FLSA. Only a bright-line rule that employers must pay employees for all work after the employee's first principal activity and prior to the employee's last principal activity, and for all wait time attendant to those activities, gives employers the incentive to minimize the amount of time an employee loses waiting for equipment or walking from an equipment room to a work station.

The court in *Tum* expressed concern that a bright line rule would simply reverse the current situation and permit employees to impose substantial costs on employers. The court gives as an example "an employee who dons required equipment supplied by the company at 5:00 a.m.—even though he is not required to punch in to work and does not punch in until 8:00 a.m." *Tum*, 360 F.3d at 280-81. This situation is again entirely within the control of the employer, who can require that equipment be donned at a

particular time and place that reduces his liability. Indeed, the FLSA imposes on the employer the obligation to ensure that employees do not perform undesired work. *See, e.g.*, 29 C.F.R. § 785.13 (management has a duty to exercise control and see that work is not performed that it does not want to be performed). Moreover, if the concern is that the employee who arrives at work early will be compensated for several hours of leisure time simply because she has already donned protective gear, such time is already excludable from compensability by regulations concerning off-duty time. *See* 29 C.F.R. § 785.16; *see also* 29 C.F.R. § 790.7(h); *Skidmore*, 323 U.S. at 137.

Thus, current regulations already distinguish between cases where an employee voluntarily shows up early and cases where the employer requires her to do so, either via workplace rule or as a practical result of the employer's business decisions. An employee who voluntarily shows up and dons equipment earlier than she needs to would not be entitled to compensation. However, when an employee is *de facto* required to report to work early so that she can don the equipment necessary for her to be on the production line at the time the employer requires her to be there, this is beyond the employee's control and should be compensated because it is done for the benefit of the employer—that is, because the employee is "engaged to wait." Under the bright line rule, once it is determined that the donning of protective equipment is compensable, and that associated wait time is time for which employees are "engaged to wait," there is no need for a further analysis of whether the wait time may nevertheless be "preliminary" under the Portal Act.

2. A Bright Line Rule Will Reduce Litigation Over Which Activities Begin and End the Workday.

Under the FLSA, the Portal Act, and Department of Labor regulations, it is clear that certain types of travel

time during the workday are compensable. For example, travel time from the place of performance of one principal activity to the place of performance of another is compensable. *See* 29 C.F.R. § 785.38; 29 C.F.R. § 790.7(c). Similarly, "[w]here an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work." 29 C.F.R. § 785.38. Such travel is excluded from the coverage of Section 4 of the Portal Act because it occurs after the employee commences his principal activities. The issue is which activities trigger the workday and remove all subsequent travel or other pre-shift activities from the coverage of Section 4.

Wait time is likewise compensable under the Portal Act when it occurs during the course of the work day, unless the employee is "completely relieved from duty" for a sufficient period of time. 29 C.F.R. §§ 785.15, 785.16. The issue with respect to wait time incident to the first principal activity is whether the employee is waiting to be engaged (which is not compensable) or is engaged to wait (which is compensable). *Skidmore*, 323 U.S. at 137. If the employee is engaged to wait, she is by definition performing a principal activity outside the coverage of Section 4 of the Portal Act, and must be compensated.

Alvarez v. IBP, Inc. resolves these issues with a simple and straightforward rule. 339 F.3d at 906-07. Under *Alvarez*, once it is established that donning protective gear or any other preparatory work activity is integral and indispensable, all subsequent work and any attendant employer-controlled wait-time is compensable. *Id.* at 906. *Tum*, on the other hand, does not resolve these issues with a general rule, but essentially adopts an *ad hoc* standard that will require every court facing a "walk time" or "wait time" issue to determine whether an activity the court has

already deemed integral and indispensable also justifies compensation for attendant wait time or subsequent walk time. 360 F.3d at 280-81, 282. This second determination is wholly unnecessary and invites a host of problems, including the potential for serious inconsistencies.

Similarly, with respect to wait time, the first principal activity test provides that once it is established that an employee is "engaged to wait" with respect to his or her first principal activity, the wait time is compensable. In contrast, *Tum* complicates this straightforward rule, injecting unnecessary additional issues and providing no guidelines for resolving them. Thus, although the First Circuit recognized that "[w]ait time is compensable when it is part of a principal activity, but not if it is preliminary or postliminary activity." *Tum*, 360 F.3d at 282 (quoting *Vega v. Gasper*, 36 F.3d 417, 425 (5th Cir. 1994)), the court concluded that "the short amount of time spent waiting in line for gear is the type of activity that the Portal-to-Portal Act excludes from compensation as preliminary." *Id.* The court emphasized that "a line must be drawn" between compensable and non-compensable wait time, but provided no guidelines for drawing that line. In fact, the *Tum* court's conclusion that time for which employees are "engaged to wait" may nevertheless qualify as non-compensable preliminary or postliminary activity under Section 4, *id.*, upsets the existing bright line rule established by this Court in *Skidmore*, and codified in 29 C.F.R. § 785.15, that employees must be paid for all such time. Moreover, under federal regulations and existing law, the shortness of the wait time is a factor leaning towards compensability. *See* 29 C.F.R. 785.16; *Mireles*, 899 F.2d at 1413 (finding shortness of wait-time favors compensability, and rejecting rule making "reasonable" waits non-compensable). The *Tum* decision throws this established law into disarray by improperly and inexplicably re-weighing this factor against compensability.

Thus, *Tum*'s *ad hoc* rule provides no principled basis for determining which activities are compensable and which are not, and in fact seriously undermines existing rules and guidelines established by the executive department and this Court. Moreover, *Tum*'s unprincipled test will increase litigation risks for both employees and employers, increasing the likelihood that employees will compromise meritorious case for far less than their actual value, and that employers will settle unmeritorious cases rather than risk an adverse finding on the compensability of walk or wait-time.

The problems created by this *ad hoc* rule are illustrated in *Reich II*, which was heavily relied upon by the *Tum* court and the defendants in the case below. The *Reich II* opinion and other decisions in the related litigation demonstrate the difficulty courts face in the absence of a bright line rule in determining which activities trigger the start of the compensable workday. *See Reich v. IBP, Inc.*, 820 F. Supp. 1315, 1325 (D. Kan. 1993) ("*Reich I*"), *aff'd* 38 F.3d 1123 (10th Cir. 1994); *Reich v. IBP, Inc.*, No. 88 2171, 1996 WL 137817, *1 (D. Kan. Mar. 21 1996) ("*Reich III*"), *aff'd sub nomine Metzler v. IBP, Inc.*, 127 F.3d 959 (10th Cir. 1997). In *Reich I*, the district court found that both donning required protective gear and retrieving a knife from the knife room were integral and indispensable activities for the knife-using employees, and that both activities were compensable. *Reich I*, 820 F. Supp. at 1325. At the same time, the court found that the wait time to retrieve protective gear, and the walk time after donning it were excluded from compensability by the Portal Act, while the wait and walk time in connection with knife retrieval was compensable. *Id.* The court's stated basis for this finding was that knife retrieval, which occurred after the donning of protective gear, was nevertheless the first principal activity of the day. *Id.*

The result of the district court's conclusions was that employees were off the clock while waiting for protective gear, on the clock while donning it, off the clock while walking to the knife room, and then on the clock again while waiting for and retrieving their knives and walking from the knife room to the production floor. However, the court put forth no principled reason for distinguishing between the donning of protective gear and the exchange of knives at the knife room in terms of starting the workday. Both activities were found to be "integral and indispensable," *Reich I*, 820 F. Supp. at 1326. In addition, while the court did not apply the *de minimis* rule in determining which activities were compensable, *id.* at 1327 n.17, any of them viewed in isolation could have been deemed *de minimis*. *See Metzler*, 127 F.3d at 962-63 (finding reasonable time of "three minutes to wait for and exchange knives [and] three minutes to put on and take off personal protective equipment"). Nor was there any practical reason for distinguishing these two activities. While part of the court's reasoning was that the sequence of activities upon arrival at the plant varied from employee to employee, this variation appears to have encompassed both donning and knife exchange. *See Reich I*, 820 F. Supp. at 1321. Moreover, the court ultimately imposed liability only for the "reasonable time" required for each of the pre-shift activities it found to be compensable, and thus, the sequence of activities was irrelevant to the employer's liability. *Reich III*, 1996 WL 137817, at *4. Thus, the variations in routine fail to inject any principle into the exclusion of post-donning walk time. Only the bright-line first principal activity rule will bring consistency and predictability to the resolution of these issues in individual cases.

B. *The Alternative Rule Suggested by the Tum Concurrence is Impracticable and Subject to the Same Abuses as an Ad Hoc Rule.*

The concurrence in *Tum* suggests a rule that only donning and doffing time that is not *de minimis* triggers the start or end of the workday for purposes of Section 4 of the Portal Act. 360 F.3d at 285 (Boudin, J., concurring). Judge Boudin argues that such a rule would be equally workable and would be equally consistent with the language and policy of the FLSA, the Portal Act, and Supreme Court precedent. As explained above, however, such a rule can only be based on a misapplication of the *de minimis* concept. Moreover, this proposal is less desirable from a policy perspective for a number of reasons.

First, as illustrated in the *Reich v. IBP* case, the rule would be difficult to apply. Viewed in isolation, each of the activities at issue in that case might be called *de minimis*. The court found that the donning and doffing of protective gear together required only three minutes. *Metzler*, 127 F.3d at 962. Similarly, exchanging knives required three minutes, and post-shift cleaning of protective equipment required two minutes. *Id.* at 962-63. None of these activities reaches the typical threshold for finding it more than *de minimis*, and thus, none would trigger the start of the workday for purposes of walk and wait time under Judge Boudin's rule. Indeed, even in aggregate, these activities required less than ten minutes (excluding walk and wait time), the threshold some courts use in making *de minimis* determinations. Nevertheless, the district court found some of the walk and wait time to be compensable. The inclusion of this time pushed the overall uncompensated time to fourteen minutes, which the court found was not *de minimis*. *Id.* Under Judge Boudin's rule, none of the walk and wait time would have been compensable, and the

other activities would have likely been found *de minimis* and non-compensable, even in the aggregate.[3]

Second, Judge Boudin's rule will leave in place—and in fact aggravate—the litigation-provoking issue of what activities are *de minimis*. Under the Boudin rule this will become the threshold issue in travel-time cases, and it will be contested in nearly every case, even those where aggregating the travel time with other pre-shift work would take the case out of the *de minimis* rule. Third, and for the same reason, the rule will leave employers just as uncertain of their obligations concerning walk and wait time as they are under present circumstances.

Judge Boudin raises the specter that the first principal activity rule will completely eviscerate the Portal Act by requiring compensation for walk time even after insubstantial activities such as donning a hard hat at a plant entrance. This concern is misplaced. Under the first principal activity rule, walk and wait time is only compensable after an activity has been found to be a principal activity or integral and indispensable to a principal activity. The lower courts have ample experience making such determinations, and this Court need not analyze whether donning a hard hat in any particular circum-

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[3] Even relatively small amounts of walk and wait time can add up to substantial amounts in the aggregate. For example, in *Reich*, the walk and wait time attendant to pre-shift knife retrieval and post-shift cleaning, which the court found compensable, amounted to six minutes per day. Six minutes per day, five days per week adds up to one half hour per week and 25 hours per 50-week work year. As a result, this seemingly insignificant amount of time could result in an employee working for well over half a week each year without compensation. Had walk and wait time attendant to donning and doffing protective gear been included, the amount of time would be even more significant.

stance is a principal activity. In *Tum*, the district court already has found the donning and doffing of certain protective gear to be a compensable activity under the facts of the case, and the First Circuit affirmed that finding. Such a finding is sufficient to render subsequent walk time compensable. Simply put, a bright line rule that the first principal activity starts the work day still requires the activity that starts the day to be a principal activity.

CONCLUSION

For the forgoing reasons, *amici curiae* NELA, LAS-ELC, and NELP urge the Court to reverse the judgment below in *Tum*. The Court should reaffirm the Portal-to-Portal Act's definition of the workday in terms of the first principal activity rule, and should reject the *Tum* rule permitting employers to carve up the workday by starting, stopping, and restarting the time clock. Specifically, the Court should hold (1) that time employees must spend walking to and from stations where safety equipment is distributed is compensable, and (2) that employees have a right to compensation for time they must spend waiting at required safety equipment distribution stations.

Respectfully submitted,

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IN THE

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO) AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS IN TUM V. BARBER FOODS (No. 04-66) AND IN SUPPORT OF RESPONDENTS IN IBP V. ALVAREZ (No. 03-1238)

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The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 58 national and international labor organizations with a total membership of approximately 13 million working men and women, files

this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.[1]

STATEMENT

These two cases were brought by employees of meatpacking industry employers claiming overtime wages under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 20 *et seq.* for the time the employees spent in donning and doffing required personal protective equipment and sanitary garb and for the time spent walking from the plant's donning locations to the plant's killing or cutting floor and from the killing and cutting floors to the plant's doffing locations.

"[M]eatpacking is one of the most dangerous industries in the United States." GAO-05-96, "Safety and Health of Meat and Poultry Workers," pp. 1 & 7 (Jan. 12, 2005), available at: http://www.gao.gov/new.items/d0596.pdf ("GAO Rep."). In order to ameliorate these dangers, meat and poultry processing employees (hereinafter meat processing employees) are required to don an array of personal protective equipment at their plant before the employees proceed to the plant's killing cutting floor. *See* 29 C.F.R. § 1910.32 (a) (OSHA standard requiring "personal protective equipment . . . . wherever it is necessary by reason of hazards of processes or environment"). Virtually all such employees are required to don personal protective equipment such as hard hats, safety goggles or face shields, earplugs, back belts, steel-toed boots, and vinyl aprons and gloves. *IBP v. Alvarez* (No. 03-1328), Pet. App. 4a n. 2 & 39a; *Tum v. Barber Foods* (No. 04-66), Pet. App. 3a-4a & 23a-25a. In addition, the employees who handle knives or other sharp implements are required to don a variety of equipment made of chain-linked metal, including

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

mesh aprons, leggings, vests, sleeves and gloves. *Alvarez* Pet. App. 4a n. 2 & 39a-40a.[2]

Meatpacking also implicates the public health, requiring that the slaughtering and butchering take place in sanitary conditions. All meat processing employees are therefore required by U.S. Department of Agriculture regulations to don a variety of sanitary garb, most particularly sanitary hair nets and smocks at the plant before the employees proceed to the plant's killing or cutting floor. *See* 9 C.F.R. § 416.5. *Alvarez* Pet. App. 39a; *Tum* Pet. App. 23a.

Much of the personal protective equipment must be stored, donned and doffed at the plant. *Alvarez* Pet. App. 3a-4a, 39a; *Tum* Pet. App. 4a. Many of the items must be cleaned at the plant of animal blood and fat at the end of the workday in order to be made ready for future use; the items made of chain-linked metal are, in any event, too unwieldy to be worn away from the plant. *Alvarez* Pet. App. 3a, 41a-42a.

All of the sanitary garb is maintained by the meatpacking employer; is provided by the employer to the meat processing employees and then donned at the plant; and is doffed at the plant and returned to the employer at the end of the workday. *Alvarez* Pet. App. 39a-40a; *Tum* Pet. App. 25a. USDA regulations require that meat processing employees don clean sanitary garb at the start of each day and that the garb be maintained in a sanitary condition throughout the day. 9 C.F.R. § 416.5(b). The employees are generally required to remove their sanitary garb before leaving the killing or cut-

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[2] The *Tum* case presents the somewhat atypical situation of a secondary poultry processing plant where boneless chicken breasts are dressed and packaged for shipment to retail outlets. *Tum* Pet. App. 21a. For the more typical situation of a plant where live chickens are slaughtered and butchered, see pages 5-9 of the Magistrate Judge's Report and Recommendation (Feb. 14, 2001) in *M.H. Fox, et al. v. Tyson Foods, Inc.*, Case No. CV-99-TMP-1612-M (N.D. Ala.), available at https://ecf.alnd.uscourts.gov/ cgi-bin/DktRpt.pl?84138.

ting floor and to re-don the garb again when they return to the floor. *Alvarez* Pet. App. 5a, 41a; *Tum* Pet. App. 28a.

SUMMARY OF ARGUMENT

I. The question common to both the *Alvarez* case and the *Tum* case is whether § 4(a) of the Portal-to-Portal Act, 29 U.S.C. § 254(a), privileges the employers here to treat their employees "post-donning-of-required-personal-protective-equipment-and-sanitary-garb" walking time from the plant's donning locations to the plant's killing or cutting floor and the employees' "pre-doffing" walking time from the killing or cutting floor to the plant's doffing locations, as noncompensable under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* The answer to that question is "no."

The Portal-to-Portal Act embodies Congress' judgment: (i) that the employer's noncompensation privilege stated in § 4(a) is to apply only to employee activities that take place either *prior to the commencement* of the employee's "workday" or *subsequent to the conclusion* of that "workday;" and (ii) that this § 4(a) employer noncompensation privilege is *not* to apply to employee activity during the "workday" proper. Section 4(a) so states in clear and unambiguous statutory language; § 4(a)'s legislative history, moreover, makes it plain that what § 4(a) statutory language so clearly states is what Congress intended it to state; and the Department of Labor's Portal-to-Portal Act regulations interpret § 4(a) in strict accord with its plain meaning and with the legislative history materials.

This Court's decision in *Steiner v. Mitchell*, 350 U.S. 247 (1956), in its turn, teaches that the employees here "commence [their] principal activity or activities," §4(a),—and thus begin their workday—when, at the beginning of their shift, the employees engage in the activity at employer-designated plant locations, of donning the personal protective equipment and sanitary garb the employer requires them to

don and that the employees "cease [their] principal activity or activities"—and thus conclude their workday—when, at the end of their shift, they engage in the activity of doffing that required personal protective equipment and sanitary garb at the plant's doffing locations. That being so, the Portal-to-Portal Act does not apply to any of the employees' post-donning/pre-doffing walking activities at the plant—whether it be walking between the plant's donning locations and the plant's killing or cutting floor, walking between places on the killing or cutting floor, or walking between the plant's killing or cutting floor and the plant's doffing locations.

II. The *Tum* case presents the Portal-to-Portal Act question of whether § 4(a) privileges the employer to treat the waiting time spent by its poultry processing employees in obtaining required personal protective equipment and sanitary garb from the employer, and in returning that equipment and garb, in the course of their workplace donning ad doffing activities, as noncompensable under the Fair Labor Standards Act. The answer to that question is "no."

This Court's decision in *Steiner v. Mitchell, supra*, establishes that the FLSA makes compensable "time incident" to an employee workplace activity, like the clothes changing there, that is "an integral and indispensable part of the principle activity for which the covered workmen are employed," *see* 350 U.S. at 248 and 256; *viz.* makes compensable the time the employee spends taking the steps necessary to accomplishing that work-place activity task. And, the employee waiting time in obtaining and returning required personal protective equipment and sanitary garb at issue in *Tum* like the time the employee spends in taking physical possession of the required items and in the physical return of those items is part and parcel of a single necessary step toward accomplishing their workplace donning and doffing activity task. That waiting time is thus compensable "time incident" to that employee workplace activity.

ARGUMENT

I. THE "POST-DONNING AND PRE-DOFFING WALKING TIME" ISSUE

In both *Alvarez* and *Tum*, the meatpacking employer: (i) requires its meat processing employees, at the beginning of their shift, to procure and don particular personal protective equipment and sanitary garb at specified plant donning locations; (ii) requires the fully outfitted employees to walk directly from the plant's donning locations to the plant's killing or cutting floor; (iii) requires the fully outfitted employees at the end of their shift to walk from the killing or cutting floor to the plant's doffing locations; and (iv) requires the employees to doff and turn in the personal protective equipment and sanitary garb that must be cleaned for future use at those doffing locations.

The question common to both cases is whether § 4(a) of the Portal-to-Portal Act, 29 U.S.C. § 254(a), privileges the employers to treat the employees post-donning walking time and the pre-doffing walking time at issue here as noncompensable under the Fair Labor Standards Act. The answer to that question is "no."[3]

The Portal-to-Portal Act states—in clear and unambiguous language—Congress' carefully considered judgment: (i) that the employer's noncompensation privilege stated in § 4(a) applies only to employee activities that take place either *prior to the commencement* of the employee's "workday" or *subsequent to the conclusion* of that "workday;" and (ii) that the § 4(a) employer noncompensation privilege does *not* apply to employee activity during the "workday" proper. Section 4(a),

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[3] The *Tum* case also raises a § 4(a) question regarding the compensability of the waiting time the employees spend in the course of donning and doffing this required personal protective equipment and sanitary garb at the plant. We treat briefly with that question in Part II of our argument, *infra*.

by its terms, has no application to employee activities that occur during the period of time that begins when an employee "commences" his "principal activity or activities" on a given day and that continues until the employee "ceases" his "principal activity or activities" for that day. 29 U.S.C. § 254(a).

This Court's decision in *Steiner v. Mitchell*, 350 U.S. 247 (1956), makes it equally clear that the meat processing employees here "commence [their] principal activity or activities"—and thus begin their "workday"—when, at the beginning of their shift, the employees engage in the activity, at employer-designated plant locations, of donning the personal protective equipment and sanitary garb the employer requires them to don and that the employees "cease [their] principal activity or activities"—and thus conclude their "workday"—when at the conclusion of their shift they engage in the activity of doffing that required personal protective equipment and sanitary garb at the plant's doffing locations. That being so, the Portal-to-Portal Act does not apply to any of the employees' post-donning/pre-doffing walking activities at the plant—whether it be walking between the plant's donning location and the plant's killing or cutting floor, walking between places on the killing or cutting floor, or walking between the plant's killing or cutting floor and the plant's doffing locations.

A.(1) Section 4(a) of the Portal-to-Portal Act provides that

> "no employer shall be subject to any liability or punishment under the Fair Labor Standards Act . . . on account of the failure of such employer . . . to pay an employee overtime compensation, for or on account of any of the following activities . . .—
>
> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. § 254 (a).

In sum, the express terms of § 4(a)(1) privilege employers to treat as noncompensable under the FLSA an employee's "activities [of] . . . walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform . . . which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities."

This statutory text clearly and unambiguously states the following two points with regard to § 4(a)(1)'s scope of application:

- First, § 4(a)(1) *does* privilege employers to treat as noncompensable under the FLSA: (i) employee "walking, riding, or traveling to the . . . [first] actual place of performance of the [employee's] principal activity or activities" at the beginning of the employee's "workday," and (ii) employee "walking, riding, or traveling . . . from the [last such] place of performance" at the end of the employee's "workday."

- Second, § 4(a)(1) does *not* privilege employers to treat as noncompensable under the FLSA, employee "walking, riding, or traveling" between one "actual place of performance of the [employee's] principal activity or activities" and a second "place of [such] performance" which "occurs [subsequent] to the time on any particular workday at which such employee commences [and prior] to the time on any particular workday at which he ceases, such principal activity or activities."

(2) The Portal-to-Portal Act's legislative history makes it plain that what § 4(a)(1) says in this regard is precisely what Congress intended to say. The Senate Report on the provision in the Senate bill that became § 4(a) states:

> "The rule laid down [in § 4(a)] is that activities which take place either prior to the time at the beginning of his workday when [an] employee commences, or subsequent to the time at the end of his workday, when [an] employee terminates his principal activity or activities, are activities (called portal-to-portal activities) which are not compensable except by contract or by a practice or custom not inconsistent therewith." Senate Report No. 48, 80th Cong., 1st Sess. 47 (1947).

In this regard, the Senate Report explains that it "uses the term 'workday' to mean that period of the workday between the commencement by the employee, and the termination by the employee, of the principal activity or activities which such employee was employed to perform." *Id.*

The Senate Report goes on to note that "[t]he term 'principal activity or activities' includes all activities which are an integral part thereof," and reiterates that "the particular time at which the employee commences his principal activity or activities and ceases his principal activity or activities mark[] the beginning and the end of his workday." S. Rep. No. 48, p. 48.

To leave no doubt about § 4(a)'s scope of application, the Senate Report, having described what is *within* § 4(a)'s limited reach, describes what is *beyond* § 4(a)'s reach: "Activities of an employee which take place during the workday are . . . not affected by this section and such activities will continue to be compensable or not without regard to the provisions of this section." S. Rep. No. 48, p. 47. And, it follows that "[a]ny activity occurring during a workday will continue to be compensable or not compensable in accor-

dance with the existing provisions of the Fair Labor Standards Act." *Id.* at 48

Each of the Senate bill's primary sponsors re-emphasized the limits of § 4(a)'s reach during the ensuing floor debate:

> • Senator Wiley, who submitted the Report on the Senate bill, explained that "activities occurring within the 'whistle-to-whistle' period are not affected by the Senate bill. Such activities are permitted to be treated as they have been, under the Fair Labor Standards Act." 93 Cong. Rec. 2084 (1947).
>
> • Senator Donnell, the Senate bill's floor manager, stated that "we are not undertaking to legislate in [this section] as to the workday proper; but we are legislating solely with respect to the preliminary activities, before the beginning of the workday, and the postliminary activities, after the conclusion of the workday." *Id.* at 2181.
>
> • Senator Cooper, the third principal sponsor of the bill, explained, "For the period from the beginning of the time of the employee's principal activity, until that principal activity is ended, we do not legislate at all. That area is still under the Wage and Hour Administrator. The rules which have already been developed by the Wage and Hour Administrator and the decisions of the courts still apply to that interval between the commencement of the employee's principal activity and the end thereof." *Id.* at 2297.

Consistent with the foregoing, in presenting to the Senate the conference agreements on the portal-to-portal bill, Senator Wiley reported:

> "Section 4 of the conference agreements relates to future claims and relieves an employer from liability for his failure to pay minimum wages or overtime compensation for activities engaged in outside of the workday, unless such activities are compensable by custom or contract. Activities performed by an employee during the

> workday are not affected in any manner by this bill, and the employer will remain liable or not liable for payment of such activities under the [FLSA] to the same extent as he would be if this bill were not enacted. In other words, they are left under the applicab[le] provisions of law in existence prior to the date of enactment of the Portal-to-Portal Act of 1947." 93 Cong. Rec. 4269.

See also id. at 4388 (where Rep. Gwynne gives a similar explanation of the conference agreements to the House).

In sum, as Senator Wiley put it, "[a]ctivities performed by an employee during the workday are not affected in any manner by [§ 4(a)]," 93 Cong. Rec. 4269, and as the Senate Report explained, the statutory term "workday" is defined "to mean that period of the workday between the commencement by the employee, and the termination by the employee, of the principal activity or activities which such employee was employed to perform," S. Rep. No. 48, p. 47.

(3) The regulations adopted by the Department of Labor shortly after the enactment of the Portal-to-Portal Act succinctly state the lessons to be drawn from the statutory language and its legislative history.

First, those regulations clearly state that "[p]eriods within the 'workday' [are] unaffected" by the Portal-to-Portal Act:

> "Section 4 of the Portal Act does not affect the computation of hours worked within the 'workday' proper, roughly described as the period 'from whistle to whistle,' and its provisions have nothing to do with the compensability under the Fair Labor Standards Act of any activities engaged in by an employee during that period. Under the provisions of section 4, one of the conditions that must be present before 'preliminary' or 'postliminary' activities are excluded from hours worked is that they 'occur either prior to the time on any particular workday at which the employee commences, or subsequent to the time on any particular workday

> at which he ceases' the principal activity or activities which he is employed to perform. Accordingly, to the extent that activities engaged in by an employee occur after the employee commences to perform the first principal activity on a particular workday and before he ceases the performance of the last principal activity on a particular workday, the provisions of that section have no application. Periods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted. The principles for determining hours worked within the 'workday' proper will continue to be those established under the Fair Labor Standards Act without reference to the Portal Act, which is concerned with this question only as it relates to time spent outside the 'workday' in activities of the kind described in section 4." 29 C.F.R. § 790.6(a) (footnotes omitted).

Second, the regulations clearly elaborate the definition of the term "workday" in the Portal-to-Portal Act as follows:

> "'Workday' as used in the Portal Act means, in general, the period between the commencement and completion on the same workday of an employee's principal activity or activities. It includes all time within that period whether or not the employee engages in work throughout all of that period. For example, a rest period or a lunch period is part of the 'workday,' and section 4 of the Portal Act therefore plays no part in determining whether such a period, under the particular circumstances presented, is or is not compensable, or whether it should be included in the computation of hours worked." 29 C.F.R. § 790.6(b) (footnotes omitted).

Finally, after stating that "[t]he term 'principal activities' includes all activities which are an integral part of a principal activity," the regulations explain that "[a]mong the activities included as an integral part of a principal activity are those

closely related activities which are indispensable to its performance." 29 C.F.R. § 790.8(b) & (c) (footnotes omitted).[4]

(4) Against that background, the sum and substance of § 4(a)(1), as Senator Cooper explained, is to provide that "[w]alking, riding, or traveling time to the place where the principal activities are performed [is] eliminated as a principal activity" so that "clearly and definitely, as to the future, an employee cannot receive compensation [pursuant to the

---

[4] Contrary to the First Circuit's suggestions at *Tum* Pet. App. 8a-9a, nothing in the Department of Labor regulations departs from, limits or modifies the regulations' recognition, 29 C.F.R. § 790 6(a), that "periods within the 'workday' [are] unaffected" by the Portal-to-Portal Act. As the Secretary of Labor stated in her *amicus* brief to the First Circuit in support of rehearing in *Tum*, the Department of Labor regulations "adhere to the 'workday' principle" throughout and none of the subsections cited by the First Circuit in its *Tum* opinion, are intended to call for, or can be properly read as calling for, the application of § 4(a) to make noncompensable any employees activity that occurs during the employee's "workday" proper. See Brief For the Secretary of Labor As Amicus Curiae Supporting Petition For Panel Rehearing And Petition For Rehearing En Banc in *Tum v. Barber Foods*, 1st Circuit Nos. 02-1679 & 02-1739, at pp. 7-8 and 10-12.

The Secretary pointed out in this regard that 29 C.F.R. 790.7(q) n.49 "stands for nothing more remarkable than the proposition that the [employee workplace] travel discussed *may* be noncompensable if the [employees'] preceding activity at the washroom or the clothes-changing place is, under the particular circumstances, not considered a principal activity. Sec. Br. at 10-11. The Secretary added that 29 C.F.R. 790.7(d) "does not address employees who must walk *after* performing their first principal activity . . . [but] only describes those situations when commuting time independently would or would not be considered a compensable principal activity, thereby starting the workday" Sec. Br. at 11-12 (emphasis in original). And, the Secretary noted that 29 C.F.R.790.7(g) and 790.8(c) treat with "activities that *normally* or *ordinarily* would not be considered principal active-ties, and thus would be considered "preliminary" or "postliminary" in nature (i.e., outside the purview of the "workday"), Sec. Br. at 12 (emphasis in original).

The Secretary of Labor's interpretation of her own regulation is, of course, entitled to the greatest weight.

FLSA] for any walking, riding, or traveling time to the actual place of performance where he begins his actual activities." 93 Cong. Rec. 2297. In other words, as the Court stated in *Steiner v. Mitchell, supra*, employee "activities . . . are compensable under the portal-to-portal provisions . . . if those activities are an integral and indispensable part of the [employee's] principal activities . . . and are not [the 'walking, riding, or traveling' activities] specifically excluded [from the term 'principal activity or activities'] by Section 4(a)(1)." 350 U.S. at 256.

Congress' point in providing in § 4(a)(1) that "an employee cannot receive compensation [pursuant to the FLSA] for any walking, riding, or traveling time to the actual place of performance where he begins his actual activities," 93 Cong. Rec. 2297 (Sen. Cooper), was to preclude any argument that walking at the start of the day to the place where an employee performs the first of his "principal activities" is so integral and indispensable to the employee's ability to perform that first activity that the walking itself must be regarded as a "principal activity."

If "walking, riding, or traveling" at the start of the day to the place where an employee performs the first of his "principal activities" had not been singled out in § 4(a)(1) as not being a "principal activity," this argument would have had force. This is so because the Portal-to-Portal Act defines "principal activity or activities" as including "closely related activities which are indispensable to [a principal activity's] performance." But this argument would have resurrected in a new guise the holding in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 691 (1946), that "time necessarily spent by the employees in walking to work on the employer's premises, following the punching of time clocks, was working time within the scope of [FLSA] § 7(a)." And, since a primary purpose of the Portal-to-Portal Act was to overrule *Mt. Clemens Pottery* with respect to "walking to work," the

language of § 4(a) was drafted so as to clearly and definitely put that argument to rest and to do so in a manner that makes it plain that § 4(a)(1), like § 4(a)(2), has no application to employee workplace activity that occurs during the employee's "workday" proper.

(5) In *Alvarez*, the petitioner-employer argues that, in § 4(a)(1), Congress went far beyond overruling the "walking to work" holding of *Mt. Clemens Pottery* and instead made noncompensable under the FLSA employee "walking that occurs *between* [the place of performance of an] 'integral and indispensable activity' and the work station." Pet. 13 (emphasis added). This reading of § 4(a)(1) runs roughshod over the language that Congress crafted and enacted to make it clear that the provision is to have *no* application to employee activity during the "workday" proper.

Section 4(a)(1) simply can*not* be read to say that employers are privileged to treat as noncompensable under the FLSA employee "walking, riding, or traveling" during the course of the workday *between* "place[s] of performance of . . . principal . . . activities." What § 4(a)(1)'s language does say, and what Congress intended it to say, is that employers are so privileged with regard to employee "walking, riding, or traveling *to* . . . the [first] actual place of performance of the]employee's] principal activity or activities" at the beginning of the workday and "*from*" the last such place at the end of the workday, 29 U.S.C. § 254(a)(1) (emphasis added). Nothing in § 4(a)(1) provides any predicate for the proposition that the provision applies to "walking, riding, or traveling" during the "workday" proper.

By the same token, the *Alvarez* petitioner-employer's effort to rest its reading of § 4(a)(1) on the *Steiner* opinion runs roughshod over that opinion's language.

As we have noted, *Steiner* defines the § 4(a) term "principal activity or activities"—and thus the range of activities compensable under the FLSA—as follows:

> "[A]ctivities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by Section 4(a)(1)." 350 U.S. at 256.

The *Alvarez* petitioner-employer would read the foregoing not as an elucidation of the meaning of the § 4(a) term "principal activity or activities" but as an elucidation of the term "walking, riding or traveling" and as if the *Steiner* Court had stated:

> "activities performed [during an employee's workday] . . . are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the [employee's] principal activities . . . and are not [the walking, riding, or traveling] specifically excluded [from being compensable] by Section 4(a)(1)."

That rendering of the *Steiner* opinion has nothing to do with the opinion the *Steiner* Court wrote. It restates what the Court said so as to put the opinion into direct conflict with § 4(a)(1)'s statutory language and with the Congressional intent clearly expressed in § 4(a)(1)'s language to make non-compensable *only* employee "walking, riding, or traveling to . . . the [first] actual place of performance of the principal activity or activities" at the beginning of the "workday" and "from" the last such place at the end of the "workday" and not employee workplace "walking, riding or traveling" during the "workday" proper.

B. As we have emphasized, § 4(a)'s statutory language states in clear terms that its provisions have no application to

employee activity during the "workday" proper—the period of time that begins when an employee "commences" his "principal activity or activities" and continues until the employee "ceases" his "principal activity or activities"

In contrast, "[t]he language of Section 4 is not free from ambiguity," *Steiner*, 350 U.S. at 254, with regard to what employee activities come within the statutory term "principal activity or activities."

But *Steiner* and its companion case, *Mitchell v. King Packing Co.*, 350 U.S. 260 (1956), fill out the meaning of that statutory term and do so in a manner that clearly establishes that the meat processing employees here are engaged in their "principal activity or activities" when they engage in the workplace donning of their required personal protective equipment and sanitary garb and when they engage in the workplace doffing of that equipment and garb.

(1) The "precise [Portal-to-Portal Act] question" in *Steiner* was:

> "[W]hether workers in a battery plant must be paid as a part of their 'principal' activities for the time incident to changing clothes at the beginning of the shift and showering at the end, where they must make extensive use of dangerously caustic and toxic materials, and are compelled by circumstances, including vital considerations of health and hygiene, to change clothes and to shower in [plant] facilities which state law requires their employer to provide." 350 U.S. at 248.

The Court answered that question "yes." Based on the language of § 4(a) read in the context of the Portal-to-Portal Act as a whole and its legislative history, the Court

> "conclude[d] that activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities

> for which covered workmen are employed and are not specifically excluded by Section 4(a)(1).
>
> We find no difficulty in fitting the facts of this case to that conclusion because it would be difficult to conjure up an instance where changing clothes and showing are more clearly an integral and indispensable part of the principal activity of the employment than in the case of these employees." 350 U.S. at 256.

(2) While *Steiner* speaks clearly for itself, we would be derelict if we failed to note two aspects of the Senate legislative materials the *Steiner* Court set out in the appendix to its opinion as providing particular support for its statement "that the Senate intended the activities of changing clothes and showering to be within the protection of the [Fair Labor Standards] Act if they are an integral part of and are essential to the principal activities of the employees," 350 U.S. at 254, and for the Court's holding.

First, elaborating on the Senate Report's explanation that "[t]he term 'principal activity or activities' includes all activities which are an integral part thereof," S. Rep. No. 48, p. 48, Senator Cooper stated "it is our opinion that those activities which are so closely related and are an integral part of the principal activity, indispensable to its performance, must be included in the concept of principal activity." 93 Cong. Rec. 2297.

Seeking clarification as to the definition of this critical statutory term, Senator McGrath asked Senator Cooper:

> "Am I correct in understanding the Senator to say that what the majority of the committee proposes is that any activity of a worker shall be considered a part of his principal activity if the doing of that act is indispensable to the performance of the rest of his day's work?" 93 Cong. Rec. 2297.

Senator Cooper then confirmed Senator McGrath's understanding. *Id.* at 2297-98.

See Steiner, 350 U.S. at 256-257.

Second, in their colloquy Senators Cooper and McGrath made it clear that the term "principal activity or activities" covers employee activities indispensable to the employee's performance that take a short time as well as those that take a longer time. In this regard Senator Cooper began by reciting two examples of "principal activities" from the Senate Report. The second example involved "a garment worker . . . who is required to report 30 minutes before other employees" and during that time "distributes clothing or parts of clothing at the workbenches of other employees and gets machines in readiness for operation by other employees." This prompted the following series of questions and answers:

> "Mr. McGrath. Is there any significance to the use of the words 'thirty minutes'? * * *
>
> "Mr. Cooper. No; there was no definite purpose in using the words 'thirty minutes' instead of 15 or 10 minutes or 5 minutes or any other number of minutes.
>
> "Mr. McGrath. Then we can clear that point up by reiterating that what the committee means is that any amount of time spent in the performance of the type of activity expressed in examples 1 and 2 is to be hereafter regarded as compensable time.
>
> "Mr. Cooper. I should certainly say so, as a part of the principal activity." 93 Cong. Rec. 2298.

See Steiner, 350 U.S. at 257-258 (omitting the two next to last portions in this exchange).

(3) *Steiner's* holding formed the predicate for the Court's companion decision in *Mitchell* v. *King Packing Co.*, *supra*, which concerned "knifemen [who] perform[ed] various butchering operations . . . in the killing room and . . . in the cutting room" of "an interstate meat packer" who "[we]re required to sharpen their own knives outside [i.e. before or after] the scheduled shift of eight hours . . . in a room [in the plant]

equipped by [their employer for that purpose] . . ." 350 U.S. at 262.

The Portal-to-Portal Act question in *King* was "whether the knife-sharpening activities of the employees . . . are within the[] classification" of "principal activities," as defined in *Steiner*. 350 U.S. at 262. The Court answered that question "yes."

Noting that "[a]ll of the knives . . . must be 'razor sharp' for the proper performance of the work," 350 U.S. at 262, the Court concluded that "the knifesharpening activities of these workmen are an integral part of and indispensable to the various butchering activities for which they were principally employed and that they must be compensated for by [the employer] in compliance with the Fair Labor Standards Act as amended by the Portal-to-Portal Act, and as construed in *Steiner v. Mitchell*," *id.* at 263.

(4) Taken together, *Steiner* and *King* clearly establish that the workplace donning of required protective equipment and sanitary garb by the meat processing employees here at the beginning of their shift and the workplace doffing of that equipment and garb at the end of their shift are among their "principal activities" within the meaning of § 4(a) of the Portal-to-Portal Act. These employees are "compelled by circumstances, including vital considerations of health and hygiene," *Steiner*, 350 U.S. at 248—that are reflected in mandatory federal health and safety standards and in their employer's rules—(i) to don personal protective equipment and sanitary garb at the plant's donning locations before proceeding directly to the plant's killing or cutting floors; and (ii) on leaving the killing or cutting floor for the day to doff that equipment and garb at the plant's doffing locations. Thus, like the employees' workplace clothes changing and showering activities at issue in *Steiner* and the employees' knife sharpening activities at issue in *King Packing*, the employees' workplace those donning and doffing activities here are "an

integral and indispensable part of the principal activity of their employment," 350 U.S. at 256.

Of equal moment, the employees' workplace donning activities constitute the first of their "principal activities" on any given workday, and the employees' doffing activities constitutes the last of their "principal activities" for that workday[5]. It follows that engaging in that donning activity marks the beginning of the employees' "workday," and that engaging in that doffing activity marks the end of that "workday." That being so, the employees' walking from the plant's donning locations to the plant's killing or cutting floor and their walking from the killing or cutting floor to the plant doffing locations at issue here occurs during the employees "workday" proper and is beyond the reach of the Portal-to-Portal Act.

II. THE *TUM* "WAITING TIME DURING THE DONNING AND DOFFING PROCESS" ISSUE

In *Tum* the employer provides: that at the beginning of their shift its poultry processing employees are to don their required personal protective equipment and sanitary garb in the plant's hallway leading off the plant's entrance (and exit) along which is arranged an equipment cage, coat racks and equipment bins; and (ii) that at the end of their shift the employees are to doff their equipment and garb at the same plant location. In the donning process the employees must procure the required items from the employer at the equipment cage window, coat racks and equipment bins. And in the doffing process the employees must turn in to the employer the required items they had obtained in the donning process. *See Tum* Pet. App. 3a-4a. Given the employer's arrangements for the donning and doffing processes "[e]mployees may have to

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[5] As we explain in Part II, infra, the donning activity in question often entails a number of successive steps, including steps necessary to procuring the equipment and garb from the designated locations at the plant.

wait to obtain and dispense with clothing and equipment. At busier times, there may be lines at the coat racks, glove liner bins, and [equipment] cage window . . .". *Id.* at 4a.

The Portal-to-Portal Act question thus presented is whether § 4(a) privileges the employer to treat the waiting time spent by the employees in obtaining required personal protective equipment and sanitary garb from the employer, and in returning that equipment and garb, as noncompensable under the Fair Labor Standards Act. The answer to that question is "no."

This Court's decision in *Steiner v. Mitchell*, *supra*, provides the starting point for analysis. *Steiner*, as we have emphasized, settles the critical, but still abstract, proposition that such employee workplace activities as "changing clothes at the beginning of the shift and showering at the end" that are "an integral and indispensable part of the principal activities for which the covered workmen are employed" are compensable under the FLSA as "principal activities." *See* 350 U.S. at 248 and 256. It is also very much to the point here that at a more concrete level *Steiner* establishes that it is "the time incident to [such] changing of clothes and showering", *id.* at 248, which in that case "was found to come to 30 minutes a day . . . for each employee," *id.* at 251, that is compensable under the FLSA. It could not be otherwise.

The descriptive phrase "changing clothes at the beginning of a shift" does not describe an instantaneous event—it describes an active process in which the employee takes a series of successive steps over time dictated by the nature of the task and by the nature of the employer's arrangements for the clothes changing process and the nature of the employers' clothes changing facility. Thus, an employee engages in the "principal activity" of "changing clothes" by going through a clothes changing process—*viz.* by taking the successive steps, and by spending the time on each, necessary to accomplish the required clothes changing task. That being so, as *Steiner*

recognizes, the FLSA makes compensable the time the employee spends taking the steps necessary to accomplish the "principal activity" task at hand—*viz.* the "time incident" to accomplishing that task.

The employee waiting time at issue in *Tum* is "time incident" to their donning and doffing of required personal equipment and sanitary garb and as such is compensable under the FLSA. The employer has arranged the donning and doffing processes, and structured the donning and doffing locations, so that a necessary step in the donning process is for the employee to "obtain [required] clothing and equipment" from the employer and a necessary step in the doffing process is for the employee to "dispense with [that] clothing and equipment" by returning it to the employer. And the employer has done so in a manner that may require the employee to have to wait his turn in lines at the employer's equipment points in order to obtain required items and in order to return required items. That "waiting" time "is incident" to the donning and doffing process just as surely as the time the employee spends in taking physical possession of the required items and as the time spent in the physical return of those items.

Indeed, the "waiting time" and the "obtaining time" do not measure two separate steps in the donning process, nor do the 'waiting time' and the "returning time" measure two separate steps in the doffing process. The necessary step to accomplishing the donning task of obtaining the required items is a single step that begins when the employee seeks to obtain the item and continues until the employee obtains possession of the item. And, that necessary step is part and parcel of the overall donning process. It cannot possibly be considered to be a Portal-to-Portal Act "preliminary activity" separate from the "principal activity" of donning the required protective equipment and sanitary garb. The same is true of the single step of returning the required items which cannot be con-

sidered to be a "postliminory activity" separate from the "principal activity" of doffing the required protective equipment and sanitary garb.

CONCLUSION

The judgment of the First Circuit in *Tum*, case no. 04-66, should be reversed, and the judgment of the Ninth Circuit in *Alvarez*, case no. 03-1238, should be affirmed.

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IN THE

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ABDELA TUM, *et al.*,

Petitioners,

v.

BARBER FOODS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, NATIONAL ASSOCIATION OF MANUFACTURERS, SOCIETY FOR HUMAN RESOURCES MANAGEMENT, AND ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

This brief *amici curiae* is being filed on behalf of the nation's leading business and human resources professional associations.[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber advocates the interests of the business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of national concern to American business. The Chamber has participated as *amicus curiae* in hundreds of cases before the United States Supreme Court and the federal Courts of Appeals, including numerous Fair Labor Standards Act ("FLSA") cases.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The Society for Human Resources Management ("SHRM") is the world's largest professional association devoted to human resources management, representing more than 190,000 individual members. Its members possess

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[1] No counsel of any party authored any part of this brief, and no person or entity, other than the *amici curiae*, their members, and their counsel, made a monetary contribution to the preparation and submission of this brief. Both parties have granted consent to the filing of this brief. Letters of consent are on file with the Clerk of the Court.

expertise in administering employee wage and benefit programs, and in designing or evaluating compensation policies to achieve high employee productivity and retention.

The Association of International Automobile Manufacturers ("AIAM") is a trade association representing fourteen international motor vehicle manufacturers who account for forty percent of all passenger cars and twenty percent of all light trucks sold annually in the United States. AIAM companies have invested nearly $28 billion in U.S.-based production facilities, have a combined domestic production capacity of 3.4 million vehicles, directly employ 93,000 Americans, and generate well over 1 million U.S. jobs in dealerships and supplier industries nationwide. AIAM's mission is to protect and promote the unique interests of the U.S. subsidiaries of international automakers and their suppliers in the United States.

The *amici* organizations ("*amici*") agree that all employers must comply with the duties imposed by the FLSA to compensate workers for all hours worked. However, FLSA lawsuits increasingly claim compensation for activities excluded from compensation under the FLSA, seeking windfall compensation for pre- and post-shift activities that often promote employee convenience and are difficult for employers to monitor.

The plaintiffs in the cases under review, *Tum v. Barber Foods, Inc.*, 360 F.3d 274 (1st Cir. 2004) (No. 04-66), and *Alvarez* v. *IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003) (No. 03-1238), ask this Court to expand the scope of the preliminary and postliminary activities for which employers can be forced to pay. The employer community is concerned such an expansion will spur a tide of hours-worked litigation with wide-ranging repercussions for the U.S. economy, as employers design their physical plants not to maximize efficiency or morale, but rather principally to avert FLSA lawsuits by minimizing pre- or post-shift walking or waiting time of their employees.

Because the employees' position disregards the limits on FLSA compensability put in place by the 1947 amendments to the FLSA, commonly known as the Portal-to-Portal Act, *amici* have filed this brief in support of Respondent Barber Foods, Inc. in No. 04-66.

SUMMARY OF ARGUMENT

Section 4 of the Portal-to-Portal Act, 29 U.S.C. § 254(a) ("the Portal Act"), provides that an employer has no duty to compensate an employee for time spent traveling or performing preliminary/postliminary activities, prior to the commencement of, or after the cessation of, the "principal ... activities which such employee is employed to perform ...." The work the employees in this case are employed to perform is meat processing; any activities occurring before the beginning or after the end of their regular shifts are generally not compensable under the Act. Subsequent to the Portal Act, a decision of this Court, *Steiner v. Mitchell*, 350 U.S. 247 (1956), carved a narrow exception into this general rule, allowing for compensability of donning and doffing of required safety equipment—activities found "integral and indispensable" to the principal activity. *Steiner* did not hold, however, that such donning and doffing are themselves principal activities such that tasks performed after their commencement and prior to their cessation for that reason become compensable.

The Court of Appeals below properly rejected the argument advanced by Petitioners, and embraced by the Ninth Circuit in *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), which would eviscerate the two central provisions of the Portal Act. Those provisions are: Section 4(a), 29 U.S.C. § 254(a), which establishes a clear rule of non-compensability for preliminary and postliminary activities; and Section 4(b), 29 U.S.C. § 254(b), which allows employers and employees to contract around this default rule in appropriate circumstances. If all time spent between donning and doffing were deemed compensable, there would

be little occasion for private bargaining—though there would be plenty of litigation, reminiscent both in form and magnitude of the torrent of cases that descended upon the federal courts after this Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). As the First Circuit ruled below, this outcome is not required by either the statute or the Secretary of Labor's interpretive regulations.

ARGUMENT

I. UNDER THE PORTAL ACT, PRELIMINARY AND POSTLIMINARY ACTIVITIES SUCH AS WALKING AND WAITING ARE NON-COMPENSABLE

A. Walking And Waiting Time Are Exempt From Compensation Because Such Activity Occurs Before Or After The Principal Activities Which Petitioners Are "Employed To Perform"

Section 4(a) of the Portal Act, 29 U.S.C. § 254(a), states that "no employer shall be subject to any liability or punishment" for failure to compensate employees for any of the following activities:

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

This language plainly controls the outcome of both cases before the Court. The employees in both *Tum* and *Alvarez* are "employed to perform" the activities of processing or slaughtering meat, and so for purposes of § 254(a), those activities are the "principal activities." Time spent on

preliminary/postliminary activities or walking to or from the "actual place of performance of the principal activity" (*i.e.*, the employee's station on the meat-cutting line) is not compensable if it occurs "prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." Since it is undisputed that all of the walking and waiting time at issue here occurs either before the processing of the first piece of meat or after the processing of the last piece, the walking and waiting time is simply not compensable under the Portal Act.

Congress specifically sought in Section 4(a)(1) of the Portal Act to exclude time spent walking or otherwise traveling "to and from the actual place of performance of the principal activity" from compensation, whether or not such time also can be excluded under Section 4(a)(2) as "preliminary or postliminary to said principal activity." The reason for this explicit exclusion of walking-traveling time was to overturn a series of Supreme Court decisions[2] that had read into the pre-1949 law a requirement of compensation of all time spent reaching "the actual place of performance," whether it be the work face of the mine, a place on the assembly line, or a position on the slaughtering line. This exclusion of walking-traveling time obtains even before Section 4(a)(2) is considered. As the Court noted in *Steiner*, its analysis of Section 4(a)(2) does not apply to pre- and post-shift activities that are "specifically excluded by Section 4(a)(1)." 350 U.S. at 256.

Petitioners nevertheless invoke the "continuous workday rule" outlined in the U.S. Department of Labor's Interpretative Bulletin 13 (1939), arguing that the *Tum* court impermissibly "interprets the Portal Act to create a markedly

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[2] *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946); *Jewell Ridge Coal Corp. v. United Mine Workers of Am., Local No. 6167*, 325 U.S. 161 (1945); *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local 123*, 321 U.S. 590 (1944).

discontinuous workday" (Pet. Br. at 24). But the continuous workday rule cannot carry the weight that Petitioners would place on it, because the First Circuit's ruling is fully consonant with its central tenet: a workday (as defined by the start and finish of the activities the employees are "employed to perform") is continuous, *once it begins*. There is no rule that also establishes the converse proposition that Petitioners urge, that all compensable time must occur during the "workday."[3] Under *Steiner*, rather, there are a few activities preceding or following the workday that happen to be compensable, notwithstanding the fact that they occur before or after the "principal activities the employee is employed to perform." Compensating those activities does not require the workday to "start," nor does the workday "stop" simply because subsequent walking or waiting time is not compensated.

In short, the only test for compensability under the Portal Act is whether the activity takes place before, during, or after "the principal activities an employee is employed to perform." There is no basis for arguing that Congress intended the compensability of all other tasks during the day to turn on whether an initial preliminary activity happens to be compensable.

B. This Court's Decision In *Steiner* Holds Only That Donning And Doffing Of Required Safety Equipment Are Compensable, Not That They Are Principal Activities In All Respects

Steiner's holding is a narrow one: it merely carves out an exception to the Portal Act for a limited class of preliminary/postliminary activities deemed in that opinion to

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[3] In fact, Interpretive Bulletin 13 expressly contemplates compensation outside the bounds of the workday. *See* Interpretive Bulletin 13, ¶ 8 ("in some cases employees may be subject to call after the completion of their regular working day" and while the employees must be compensated for time spent answering the call, in some circumstances the intervening time "need not ordinarily be considered hours worked").

be "integral and indispensable" to a principal activity. Relying on the legislative history, the Court held that the donning and doffing of protective clothing were "integral and indispensable" to the "direct or productive labor" for which the battery plant workers in that case were "primarily paid," *Steiner*, 350 U.S. at 248—*i.e.*, the work they were "employed to perform." The donning and doffing were considered compensable activities notwithstanding the text of the Portal Act.

The Court did not alter the Portal Act's basic § 4(a) definition of an employee's "principal activity or activities" as the "activity or activities ... such employee is employed to perform." Such an extension would have ignored the very same Senate committee report the Court relied upon, which evinces a clear Congressional intent *not* to compensate time spent walking to and from the employee's workstation, regardless of the relation in time of that walk to activities that might be thought to commence a "workday." In the words of the Senate Judiciary Committee

> [t]he following activities outside the workday are among those not to be considered compensable under the Fair Labor Standards Act . . . : [w]alking, riding, or traveling to and from the actual place of performance of the principal activity or activities within the employer's plant . . . irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or *before or after the employee has checked in or out.*

S. Rep. No. 80-48, 1st Sess., at 47 (1947) ("Senate Report") (emphasis added).[4]

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[4] While not entirely identical situations, checking in and out closely parallel the preliminary/postliminary activities at issue here. In this passage, checking in and out serve as rough measures of the beginning or the end of the workday, just as Petitioners claim that donning and doffing bookend their workday. The point of the passage, however, is that the time clock is not a relevant measure under the Portal Act; walking time was not to be compensable regardless of its relation to the start or end of

In addition to their "continuous workday" contention, Petitioners assert that the walking and waiting time at issue in this case are themselves compensable under *Steiner* as "integral and indispensable" parts of their primary activities, regardless of when the workday is thought to begin. Pet. Br. at 36-38. But *Steiner* is limited on its own terms to the compensability of preliminary or postliminary activities as defined by § 4(a)(2)[5]; it did not purport to decide, nor did it address, the compensability of the "walking, riding or traveling" exempted from compensation by § 4(a)(1). The question in *Steiner* was simply whether FLSA compensation was owed for the particular activity of "chang[ing] clothes and shower[ing] in facilities which State law requires the[] employer to provide"; according to the record before the Court, the time spent "in clothes changing and showering . . . was found to amount to thirty minutes a day."[6] Moreover, the opinion relied heavily on legislative history indicating that Congress specifically intended integral and indispensable clothes-changing activities to be compensable—in marked contrast to the treatment accorded to time spent "walking, traveling, [and] riding," which Congress "clearly eliminated from compensation."[7]

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the "workday," if that time occurred before the commencement or after the cessation of the principal activity. The same is true of walking that takes place after donning or before doffing; it is not compensable—whether or not the "workday" in some colloquial sense has started.

[5] *See Steiner*, 350 U.S. at 248 (formulating question presented as "whether workers in a battery plant must be paid as a part of their 'principal' activities for the time incident to changing clothes at the beginning of the shift . . . or whether these activities are 'preliminary' or 'postliminary' within the meaning of the Portal-to-Portal Act.")

[6] Br. for Respondent, *Steiner v. Mitchell*, No. 22, O.T., 1955, at 7.

[7] 29 C.F.R. § 790.7(d) n.47 (quoting statements of Senator Cooper on March 20, 1947, 93 Cong. Rec. 2299); *see also* Senate Report at 47 (noting that "[w]alking, riding, or traveling to and from the actual place of performance of the principal activity" belongs to a category of activities that are "not to be considered compensable under the Fair Labor Standards Act").

Nor did *Steiner* purport to overturn *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which remains the leading decision of this Court as to the compensability of waiting time. It is undisputed that the Portal Act does not render compensable any activity that was previously non-compensable.[8] Thus, the compensability of waiting time remains unaffected by *Steiner* and is controlled by the Court's test in *Skidmore* as to whether the "[f]acts . . . show that the employee was engaged to wait, or they . . .show that he waited to be engaged." *Skidmore*, 344 U.S. at 137. Petitioners have not established a case for the compensability of waiting time within the strictures of *Skidmore*.[9]

Petitioners thus do not advance any independent argument as to the compensability of the waiting time in this case. Rather, they seem to suggest that *Steiner* overturned *Skidmore sub silentio* by establishing a test for judging the compensability of waiting time other than the "engaged to wait"/"waiting to be engaged" test—namely, the "integral and indispensable" test applied by Petitioners on pages 37-39 of their brief. But *Steiner* could not have so held, as the compensability of waiting time was not an issue before the Court. Petitioners' analysis should therefore be rejected in its entirety.

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[8] The plain text of § 4(a) establishes certain categories of labor for which employers shall be relieved of "any liability or punishment" under the FLSA. For activities that do not fall within these categories, the "liabilities and obligations under the Fair Labor Standards Act . . .are not changed in any way by section 4 of the Portal Act." 29 C.F.R. § 790.8(a). In other words, the Portal Act created new exemptions from liability but no new obligations to pay wages.

[9] On the facts of this case, Petitioners make no effort to demonstrate that their wait results from any factor other than "the number of employees involved," in which case the wait is not compensable. *See Vega ex rel. Trevino v. Gasper*, 36 F.3d 417, 427 (5th Cir. 1994) (citing D.O.L. Opinion Letter WH-533 (Dec. 16, 1991)).

C. The Structure Of The Portal Act Makes Clear That Congress Intended Preliminary And Postliminary Activities To Be Compensated By Means Of Private Agreements

The interpretation of Section 4(a) advanced above also finds support in the interrelationship of Sections 4(a) and 4(b) that together implement a policy favoring private agreements or industry customs over judicial fiat as the means for determining compensation for pre- or post-shift activities. The Portal Act, after all, does not prohibit their compensation. Rather, subsection (a) provides that these activities are non-compensable *ab initio*, and subsection (b) provides that they can be made compensable by contract or custom.[10] Together, these provisions allow the directly affected parties to reach a mix of compensation and non-compensation suitable for each employment context.

Private bargaining, as contemplated by § 4(b), can only occur if the parties start from a position of non-compensability.[11] An activity is removed from the scope of private bargaining if a court finds it compensable. This is true both for the FLSA in general, *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945) (noting "policy considerations which forbid waiver of basic minimum and overtime wages under the Act"), and rights to compensation

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[10] In addition, § 4(d) of the Act, 29 U.S.C. § 254(d), provides maximum flexibility to such contracts or customs by allowing the parties to agree to compensate portions of preliminary or postliminary activities while leaving others uncompensated. *See, e.g.*, 29 C.F.R. § 790.5(b) (providing an example of the potential application of § 254(d)).

[11] Specifically, 29 U.S.C. § 254(b) provides that "[n]otwithstanding the provisions of subsection (a) ... which *relieve an employer from liability* and punishment with respect to any activity, the *employer shall not be so relieved if such activity is compensable by either* . . . an express provision of a written or nonwritten contract . . . [or] a custom or practice in effect" (emphasis added). The statute confers no authority to relieve an employer from liability if the employer is not so relieved under subsection (a).

under *Steiner* or the industry custom provisions of § 4(b), *see Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 732 n.7, 740-41 (1981) (emphasizing that FLSA rights, including rights to customary compensation for preliminary activities under § 254(b), cannot be "abridged by contract"). In other words, the Portal Act's bargaining policy works only in one direction: it encourages private parties to negotiate as to the compensability of non-compensable activities, but not vice versa.

Petitioners' interpretation would frustrate this Congressional policy because of the across-the-board manner by which it would render activities compensable and therefore non-negotiable. Compensability would unalterably depend on when an activity occurs in relation to certain other activities. A judicial decision finding compensable an initial preliminary activity and/or a final postliminary activity (*e.g.*, donning and doffing) would foreclose negotiations for all associated activities. Their compensability would be determined by inflexible, formalistic rules rather than factors relevant to the employment relationship.[12]

Congress enacted the Portal Act in response to a series of this Court's decisions, most notably *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), that burdened employers with unexpected FLSA liabilities and unraveled established compensation patterns in many industries. As Section 1 of the Portal Act, 29 U.S.C. § 251, observes:

> The Congress finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation.

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[12] For instance, the nature of the activity, how easily it can be monitored, how compensability would relate to other compensation provisions, and tradeoffs between compensation and improved working conditions.

The legislative solution was to insulate compensability decisions from the courts and leave them to be worked out privately by the parties themselves. This had been Justice Burton's desired approach in his *Mt. Clemens* dissent,[13] quoted with approval by the Senate Judiciary Committee. *See* Senate Report at 11 (quoting Justice Burton's dissent at length); *id.* at 45, 49 (noting that Section 4 "also provides that no judicial or administrative interpretation of the Fair Labor Standards Act ... shall have the effect of changing any written or nonwritten contract between the employer and employee ... to make compensable any portal-to-portal activities").

Contrary to Petitioners' suggestion, Pet. Br. at 31, the fact that Congress, in § 2 of the Portal Act, sought to eradicate the retroactive mischief wrought by *Mt. Clemens* does not imply that Congress was indifferent to the prospective effect of its legislation on private bargaining. Indeed, two years after the Portal Act, Congress further encouraged private bargaining when it added section 3(o) to the FLSA, which provides affirmative (though limited) authority for parties to a collective bargaining agreement to agree to exclude otherwise compensable donning and doffing from the computation of "hours worked."[14]

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[13] *See Mt. Clemens*, 328 U.S. at 697 (Burton, J., dissenting) ("While conditions vary widely and there may be cases where time records of 'preliminary activities' or 'walking time' may be appropriate, yet here we have a case where the obvious, long-established and simple way to compensate an employee for such activities is to recognize those activities in the rate of pay for the particular job. These items are appropriate for consideration in collective bargaining").

[14] 29 U.S.C. § 203(o) establishes that "In determining . . . the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing ... which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement ...."

In any event, Petitioners' proposed extension of *Steiner* plainly contravenes Congressional intent, since it subverts private bargaining *and* magnifies the retroactive effects of judicial rulings. The Portal Act would no longer function as a shield to protect private arrangements from judicial interference; it would become an instrument plaintiffs can use to secure windfall benefits from the courts. A finding that an initial preliminary activity was "integral and indispensable" would render a potentially much larger swath of time compensable on a retroactive basis, thus making it more difficult for employers to implement business plans. Petitioners thus would turn the Portal Act's goals squarely on their head; instead of encouraging private negotiation and discouraging retroactive liabilities, it would make it more difficult for settled contractual bargains to be enforced.

D. A Rule Of Compensability Here Would Result In Incongruous Treatment Of Similar Situations

A ruling in favor of compensability of post-donning waiting and walking time would also create compensation scenarios that run contrary to common sense and could not have been the intended result of either the Portal Act or *Steiner*. As an illustration, consider two employees who work at adjacent workstations, each a ten minute walk from the plant gate—a walk that is plainly not compensable, *see* 29 C.F.R. § 790.7(f). However, if one of the employees is required to stop at a changing station two minutes from the plant gate and don certain required safety gear, then this employee will gain the windfall benefit of an additional eight minutes of compensation for the remainder of his or her walk to the workstation—the exact same walk that remains non-compensable for the employee who wears no safety gear. If the changing station were located eight minutes from the plant gate, the windfall would shrink to two minutes of walking time. This makes no sense. While *Steiner*'s holding that the donning time is compensable seems sound, there is no reason that the mere act of donning safety gear should

transform an otherwise non-compensable walk into compensable activity.

Of course, not all changing stations are conveniently placed directly along the route from plant gate to workstation; in many plants, the location of the changing station may increase the employees' overall walking time. But this consideration simply reinforces Congress' wisdom in leaving any related compensation issues to private bargaining to the greatest extent possible. In a plant where the changing station is conveniently located near employee workstations, the parties may agree not to compensate the walk from changing station to workstation; in plants where the changing station is located further away, the parties might agree to compensate some or all of that walking time. But a rule that walking time is always compensable would frustrate the ability of employers and employees to reach sensible and equitable compensation arrangements.[15]

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[15] Such a rule could also compromise the operational efficiency of the plant or factory. For instance, using the example above, it may be considerably cheaper for the changing station to be placed eight minutes from the employees' workstations rather than two minutes away. If the employees are largely indifferent to that location, since they have a ten-minute uncompensated walk regardless of the location of the changing station, it would clearly be in the interests of the entire enterprise for the employer to position the changing station at the cost-minimizing location. However, under a legal rule in which employers must compensate employees for all walking that occurs after changing, even if the employees would face the same walk in the absence of changing, the employer would have a strong incentive to locate the changing station as close as possible to the workstations, even if that location creates additional costs for the enterprise that ultimately will detract from the resources available for the compensation of work.

II. THE DEPARTMENT OF LABOR'S INTERPRETIVE REGULATIONS DO NOT SUPPORT PETITIONERS' ARGUMENT

A. The Secretary's Regulations Are Not Due *Chevron* Deference

The Government devotes a sizeable portion of its brief to the propositions that the Department of Labor regulations and the Secretary's subsequent interpretation of those regulations are "entitled to deference." U.S. Br. at 16, 21. The government cites *Barnhart v. Walton*, 535 U.S. 212, 221 (2002)—an inapposite case involving substantive regulations of the Social Security Administration, promulgated after notice-and-comment procedures, *see id.* at 217, and pertaining to its task of administering a large benefits program. To the extent that *Barnhart* can be read to support the Government's proposition that informal rules may qualify for *Chevron* deference, it is limited to regulations incident to the administration of a federal program; *see id.* at 221-22 (observing that the "'power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy'") (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)). In the FLSA context, however, the Secretary of Labor does not oversee a benefits program and has no administrative responsibilities analogous to those at issue in *Barnhart*.

The general rule for *Chevron* deference is stated in *United States v. Mead Corp.*, 533 U.S. 218, 226 (2001): "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law." The Secretary's regulations cannot meet this test since she does not possess the authority to engage in legislative rule-making for the Portal Act. In the FLSA context, Congress has typically delegated, by means of explicit statutory command, such

authority for particular issues only. *See, e.g.*, 29 U.S.C. 213(a)(1) (calling for "regulations of the Secretary" to "define[] and delimit[]" the terms "bona fide executive, administrative, or professional capacity."). No such delegation exists anywhere in the Portal Act. Nor can it be gleaned from "other statutory circumstances" that "Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute," *Mead*, 533 U.S. at 229, since the Portal Act delegated no authority to the Secretary. To the contrary, the statutory text addresses a number of highly detailed issues that might, in other situations, be left to an agency.[16]

The Secretary has evidently recognized this lack of authority to promulgate legislative rules for the Portal Act, since the Portal Act regulations are contained in Subchapter B of the Wage and Hour Division Regulations, entitled "Statements of General Policy or Interpretation Not Directly Related to Regulations." 29 C.F.R. §§ 775.0-794.144. These "advisory interpretations" "serve only to indicate the construction of the law which will guide the Administrator in the performance of his administrative duties . . . unless he shall subsequently decide that his prior interpretation is incorrect." 29 C.F.R. § 775.1. In other words, they are statements of general policies, not interpretations to which the courts owe *Chevron* deference. *See Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (holding that "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency

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[16] *See, e.g.*, 29 U.S.C. § 254(d) (instructing that "in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities . . . there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section"); 29 U.S.C. § 256 (setting forth a detailed methodology for determining the date of commencement of future actions).

manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference").[17]

B. In Any Event, The Regulations Do Not Indicate Compensability For The Walking And Waiting Time In This Case

Both the Government and Petitioners rely heavily on the Secretary's regulations to bolster their case. Admittedly, at first glance, two provisions may appear helpful to Petitioners' cause: 29 C.F.R. § 790.6(a) says that "[p]eriods of time between the commencement of the employee's first principal activity and the completion of his last principal activity on any workday must be included in the computation of hours worked to the same extent as would be required if the Portal Act had not been enacted"; and 29 C.F.R. § 790.8(b) provides that "[t]he term 'principal activities' includes all activities which are an integral part of a principal activity." A reading of these statements that ignores the surrounding context might support Petitioners' contentions, but when viewed in light of other statements in the same interpretative regulations, these provisions are best read as endorsing the opinion of the First Circuit below and the Portal Act interpretation advanced in Point I.A above.

Consider, for instance, 29 C.F.R. § 790.7(d), which provides that a logger should be compensated for time spent walking to his cutting spot if he must carry heavy power tools during the walk, but not compensated for the walk if he carries ordinary hand tools. In the first case, the walking "is not segreable from the simultaneous performance of his assigned work (the carrying of the equipment, etc.)," *id.*; in the second case, though, his walking time would be non-

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[17] Moreover, *Chevron* deference would be inappropriate because the statutory text is clear. *See General Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004) (deference appropriate "only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent").

compensable no matter how "integral and indispensable" was the prior time spent gathering hand tools.

Indeed, the position advanced by Petitioners that the performance of compensable preliminary activities commences a period of continuous paid work time is squarely contradicted by the explicit advice offered by 29 § C.F.R. § 790.7(g) n.49 that:

> Washing up after work, like the changing of clothes, may in certain situations be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity."... This does not necessarily mean, however, that *travel between the washroom or clothes-changing place and the actual place of performance* of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers. (emphasis added).[18]

Petitioners acknowledge that this footnote indicates that the regulations "take no position regarding the circumstances under which travel between a washroom or clothes-changing place and the place of performance of a principal activity" would be compensable. Pet. Br. 34. The Government calls the provision "ambiguous." U.S. Br. at 20. In other words, Petitioners and the Government effectively concede that the regulations do not support the specific arguments they make before the Court.

In any event, the regulations cannot be interpreted to support Petitioners' position without rendering § 4(a) of the Portal Act a virtual nullity. If, for instance, the acts of

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[18] Indeed, far from obscuring the distinction between principal and preliminary/postliminary activities, the regulations reinforce it. The reference above to "travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform" indicates that the changing of clothes, even where it is deemed an "integral part" of an employee's principal activity, is still not the *work that the employee is employed to perform.*

donning and doffing—as indispensable parts of the normal principal activities—were themselves principal activities, as suggested by § 790.8(b), then any activity that was an integral and indispensable part of donning and doffing could itself become a principal activity, and so on.[19] Furthermore, performance of a single "integral and indispensable" preliminary activity before a long morning commute could, under Petitioners' interpretation, render compensable the entire commute, from portal to portal.[20] The distinction so central to the statute would become blurred beyond recognition—a state of affairs that no interpretative regulation could tolerably bring about.

The First Circuit below recognized this implication of Petitioners' argument, noting the "absurd result that an employee who dons required equipment supplied by the company at 5:00 a.m., at his own home, starts his workday for FLSA purposes at 5:00 a.m." *Tum*, 360 F.3d at 281. The Government now seeks to distance itself from this logic by drawing a line between donning and doffing performed on the employer's premises and all other donning and doffing, with only the former being compensable. U.S. Br. at 23 (citing 29 C.F.R. § 790.8(c) n.65 ("Note 65")).

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[19] *See, e.g., Reich v. New York City Transit Auth.*, 45 F.3d 646, 651 (2d Cir. 1995) (rejecting claim that performance of a compensable preliminary activity renders subsequent commuting time compensable, because this logic would "justify [compensability] for 24 hours a day").

[20] *See, e.g., Boudreaux v. BanTec*, 2005 U.S. Dist. LEXIS 3323 (E.D. La. Feb. 22, 2005), in which plaintiff computer-repair technicians sought compensation for travel to and from their homes, on the theory that their performance at home of a number of preliminary "administrative duties" such as the required reading of work-related email rendered the subsequent commute compensable. The district court declined to grant summary judgment to the defendants "due to the lack of supporting legal precedent." *Id.* at *14. *See also Dooley v. Liberty Mut. Ins. Co.*, 307 F. Supp. 2d 234, 243 (D. Mass. 2004) (holding commuting time to be compensable when employees were required to check email and voice mail, prepare computers for use, and return telephone calls before beginning their commute).

The Government's position here is based on the premise, offered in its brief but not explicit in the cited portion of the agency's interpretive regulations, that off-site activity is non-compensable because "employer control is an important factor in determining whether an activity is an integral and indispensable part of an employee's principal activities." U.S. Br. at 24. However, employer control is a necessary but not sufficient condition of compensability under the Portal Act.[21] Indeed, the Government would read § 4(a)(2) right out of the statute, since an employee's time is typically not even counted as work unless it is under the employer's control. *See* 29 C.F.R. § 785.15 (observing that time that "belongs to and is controlled by the employer" qualifies as compensable work). If that same control prevented an activity from being considered preliminary or postliminary, then there would be no activities rendered non-compensable by § 4(a)(2); the only activities that remain non-compensable under the Government's interpretation would be non-work that was not compensable even before the Portal Act.

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[21] The Secretary's regulations acknowledge that employer control cannot be determinative of Portal Act compensability. For instance, travel time from work gate to work station is non-compensable, regardless of whether the travel is controlled by or even provided by the employer. *See* 29 C.F.R. § 790.7(f) (noting that time spent "riding on buses between a town and an outlying mine or factory where the employee is employed" and "riding on buses or trains from a logging camp to a particular site at which the logging operations are actually being conducted" is not compensable even if under the employer's control) (footnote omitted).

CONCLUSION

For all of the reasons above, *amici* organizations respectfully urge the Court reverse the judgment of the Ninth Circuit in *Alvarez*, and affirm the First Circuit in *Tum*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ABDELA TUM, *et al.*,
Petitioners,

v.

BARBER FOODS, INC., d/b/a BARBER FOODS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF THE NATIONAL CHICKEN COUNCIL AND AMERICAN MEAT INSTITUTE AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

Under section 4(a) of the Portal-to-Portal Act of 1947, an employer's obligation to pay wages under the Fair Labor Standards Act of 1938 ("FLSA") does not include time an employee spends "walking . . . to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" or time which an employee spends engaged in "activities which are preliminary to or postliminary to said principal activity or activities." 29 U.S.C. § 254(a).

This brief for *amici curiae* will address the following questions presented:

1. Is the walking that occurs between compensable pre and post-shift clothes-changing and the time employees arrive at or depart from their actual workstations non-compensable "walking . . . to and from the actual place of performance of the principal activity or activities which such employee[s] [are] employed to perform" within the meaning of section 4(a)(1)?

2. Under the FLSA, as amended by the Portal-to-Portal Act, are employees entitled to compensation for time spent waiting to obtain sanitary or protective attire?

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IN THE

Supreme Court of the United States

No. 04-66

ABDELA TUM, *et al.*,
Petitioners,

v.

BARBER FOODS, INC., d/b/a BARBER FOODS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE NATIONAL CHICKEN COUNCIL AND AMERICAN MEAT INSTITUTE AS *AMICI CURIAE* SUPPORTING RESPONDENT

INTEREST OF THE *AMICI CURIAE* [1]

The National Chicken Council ("NCC") is the primary trade organization representing the poultry industry in the United States. The member companies of NCC produce and process about 95 percent of meat-type chickens marketed and employ in excess of 350,000 workers throughout the United States.

[1] The consents of the parties have been filed with the Clerk of Court. Pursuant to Rule 37.6, *amici* NCC and AMI state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *Amici*, has made a monetary contribution to the preparation of submission of this brief.

The American Meat Institute ("AMI") is the nation's oldest and largest trade association representing packers and processors of beef, pork, lamb, veal, turkey and processed meat products. AMI member companies produce more than 95 percent of meat products available in the United States. There are more than 200,000 workers employed in the meat packing and processing industries in the United States. AMI has represented the interests of the meat packing and processing community since the Federal Meat Inspection Act was passed in 1906.

Each of the *amici* noted above has a compelling interest in the issues presented in this case. Petitioners and their supporting *amici* urge the court to hold that the walking and waiting time at issue in this case is compensable. We disagree. Such a holding would reverse many years of precedent and would affect timekeeping practices and systems in place throughout almost all types of public and private employment. Such a holding would create immense liabilities for employers who are members of the *amici* organizations resulting from both litigation and costs associated with developing and implementing new timekeeping systems and practices.

The plaintiffs in the cases under review, *Tum v. Barber Foods, Inc.*, 360 F.3d 274 (1st Cir. 2004) (No. 04-66) and *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003) (No. 03-1238), urge an interpretation of the FLSA which would undermine the 1947 Portal-to-Portal Act and would upend the payroll and timekeeping practices of almost all employers in order to achieve the illusory benefit of a temporary windfall for the plaintiffs in these and other similar cases. The interpretation urged by petitioners and supporting *amici* in this case is contrary to the congressional intent and clear language of the Portal-to-Portal Act. NCC and AMI accordingly submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

In this case, petitioners and the *amici* parties supporting petitioners contend that poultry and meat processing employees are entitled to compensation for time spent walking to and from their workstations. It is also argued to the Court that time spent waiting to obtain certain sanitary or protective attire is compensable activity under the Fair Labor Standards Act (hereinafter "FLSA"). petitioners and the *amici* parties who have filed a brief in support of the petitioners are thereby urging this court to return to the rejected holding of *Anderson v. Mt. Clemens Pottery, Co.*, 328 U.S. 680 (1946), which was expressly overruled by the Portal-to-Portal Act of 1947.

Petitioners and supporting *amici* advocate an expansion of the compensable workday that would profoundly affect the timekeeping practices, policies and systems of a broad range of employers in both public and private employment. To achieve this end the Court is urged to define the compensable workday based upon the first and last compensable activity. These arguments, however, are based upon a misapplication of the court's opinion in *Steiner v. Mitchell*, 350 U.S. 247 (1956), are contrary to the Secretary of Labor's (hereinafter "Secretary") interpretive regulations and, most importantly, are contrary to the language and clear purpose of the Portal-to-Portal Act.

The standard advocated by petitioners and their supporting *amici* would create the same substantial and unanticipated liabilities which the Portal-to-Portal amendments were enacted to prevent and would, moreover, abolish the *de minimis* rule which has a long history under the FLSA.

If the concept of the compensable workday under the FLSA is expanded as advocated by petitioners in this case, employers would face claims for walking time following what is considered to be the first compensable pre-shift activity and walking time preceding the last compensable post-shift activ-

ity at the conclusion of the day. The sanitary and protective attire at issue in this case is common to many types of employment. Any employer that employs individuals who wear common types of sanitary or protective attire would be subject to claims for waiting, walking and travel associated with obtaining, donning, doffing or disposing of such attire.

The arguments advanced in support of petitioners' position in this case seek to achieve an end run around the clear language and express purpose of the Portal-to-Portal Act and to eradicate the concept of "*de minimis*" activities from FLSA jurisprudence. Such a radical redefinition of terms commonly applied under the FLSA would require congressional action.

ARGUMENT

I. PETITIONERS ARE ADVOCATING A RETURN TO THE HOLDING OF *MT. CLEMENS POTTERY* WHICH WAS LEGISLATIVELY OVERRULED BY THE PORTAL-TO-PORTAL ACT.

In *Anderson v. Mt. Clemens Pottery, Co.*, 328 U.S. 680 (1946), the definition of "work" under the FLSA was extended to include time spent by employees walking to and from their workstations and time spent in ancillary activities at workstations before and after shift. The *Mt. Clemens* Court concluded that walking to a workstation required an employee to be on the employer's premises and that without the employee walking to the workstation, the "productive aims of the employer" could not have been met. *Id.* at 691. The Court concluded that walking constituted "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Id.* at 691-92 (footnote omitted) (quoting *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944), and *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161, 164-66 (1945)).

Congress acted immediately to overturn the *Mt. Clemens* decision. In its next session in 1947, Congress passed the Portal-to-Portal Act with the express purpose of foreclosing "portal-to-portal" pay claims seeking compensation for the time from the instant an employee sets foot on the employer's premises to the time of departure. It has been widely recognized that the Portal-to-Portal Act was a direct congressional response designed to nullify the *Mt. Clemens* decision. *See, e.g., Steiner v. Mitchell*, 350 U.S. 247, 253 (1956) (stating that the Portal-to-Portal Act was designed to meet an emergency resulting from the employee claims arising from the *Mt. Clemens* decision, which, if allowed to continue, would have created "wholly unexpected liabilities" to employers that were "immense in amount"); *Tum v. Barber Foods, Inc.*, 360 F.3d 274 (1st Cir. 2004), *cert. granted*, 125 S. Ct. 1295 (2005) (observing that the purpose of the Portal-to-Portal Act was "to exclude preliminary and postliminary waiting and walking time from compensability); *Reich v. IBP, Inc.*, 820 F. Supp. 1315, 1323 (D. Kan. 1993) *modified and vacated in part by* 1 Wage & Hour Cas. 2d (BNA) 863 (D. Kan. June 2, 1993), *aff'd and remanded by* 38 F.3d 1123 (10th Cir. 1994), (stating that "[t]he legislative history of the Portal Act indicates that preliminary activities such as those held to be compensable in *Mt. Clemens* are no longer compensable under FLSA"); *United States v. Cook*, 795 F.2d 987 (Fed. Cir. 1986) (observing that intent of Portal-to-Portal Act was to prevent thousands of lawsuits to recover wages for time workers were in transit to and from workstations); *North-Western-Hanna Fuel Co. v. McComb*, 166 F.2d 932 (8th Cir. 1948) (stating that it was common knowledge that congressional intent was to cut off vast amount of unforeseen damages some Supreme Court decisions created to the detriment of employers); *Bateman v. Ford Motor Co.*, 76 F. Supp. 178 (E.D. Mich. 1948), *aff'd sub nom Fisch v. Gen. Motors Corp.*, 169 F.2d 266 (6th Cir. 1948), *cert. denied*, 335 U.S. 902 (1949) (stating that the "main purpose" of the Portal-to-Portal

Act was to prevent employees' claims for time spent "walking, washing, punching the clock, changing clothes, etc."). In contending that walking time is compensable in the present case, the petitioners are urging this Court to turn back the clock to pre-1947 reasoning which would create enormous and unforeseen liabilities and would also require wholesale revisions to timekeeping practices and systems throughout all types of public and private employment.

The congressional purpose motivating the enactment of the Portal-to-Portal Act could not have been made more clear. Section 1 of the Act states that:

> The Congress finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation . . . 29 U.S.C. § 251(a).

The Portal-to-Portal Act makes expressly clear that time spent walking, as well as time spent performing other preliminary or postliminary activities, is "not compensable." The Act provides:

> **(a) Activities not compensable**
>
> Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended . . . on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947—
>
> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

> (2) activities which are preliminary to or postliminary to said principal activity or activities.
>
> which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. § 254(a) (Supp. 1997).

This section of the Portal-to-Portal Act makes clear that the Portal-to-Portal Act excludes not only "preliminary" and "postliminary" activities as generally defined by subsection (a)(2), but also expressly excludes the "walking" time (subsection (a)(1)) at issue in this litigation.

The contention that the walking time at issue in this case is compensable notwithstanding the clear language of the Portal-to-Portal Act is an attack on longstanding precedent and timekeeping practices based upon such precedent. Applying the Portal-to-Portal Act, courts have concluded that even significant time spent walking or otherwise traveling to and from a work site is not compensable, even where such travel occurs on the employer's property. In *Carter v. Panama Canal Co.*, 463 F.2d 1289 (D.C. Cir. 1972), locomotive operators employed on locks operated by the Panama Canal Company were required to be on board their locomotive at the beginning of their shift. Prior to their shift, the operators were required to check an assignment board and then walk 2 to 15 minutes to reach their locomotive, depending upon the location of the locomotive to which they were assigned. *Id.* at 1291. The court concluded that the principal activity of the operators was operation of the locomotive, and the actual place of performance of their work was the locomotive itself. *Id.* at 1294. The court found "little room for question" that the locomotive operators' claim for compensation for time spent walking to and from their locomotives were "precluded by the Portal-to-Portal Act." *Id.* at 1292. Similarly, in *Ralph v. Tidewater Constr. Corp.*, 361 F.2d 806 (4th Cir. 1966),

operating engineers and ironworkers employed in the construction of the Chesapeake Bay bridge sought compensation for a daily boat ride to their work site,, which required 15 minutes to 1 hour each way. The Fourth Circuit found that claims for such compensation were specifically precluded by section 4(a) of the Portal-to-Portal Act.. *Id.* at 808-09; 29 U.S.C. § 254(a).

That the interpretation of the FLSA advocated by petitioners would require wholesale revision of timekeeping practices throughout a wide range of public and private employment is demonstrated by the wide variety of employers who have faced similar claims. Such claims have been pervasive in meat and poultry processing. *See, e.g., De Ascencio v. Tyson Foods, Inc.*, 342 F.3d 301 (3rd Cir. 2003); *Reich v. Monfort, Inc.*, 144 F.3d 1329 (10th Cir. 1998); *Gonzalez v. Farmington Foods, Inc.*, 296 F. Supp. 2d 912 (N.D. Ill. 2003); *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556 (E.D. Tex. 2001), *aff'd*, 44 Fed. Appx. 652 (5th Cir. 2002); *Pressley v. Sanderson Farms, Inc.*, 143 Lab Cas (CCH) ¶ 34,262 (S.D. Tex. Apr. 23, 2001), *aff'd without publisshed opinion* 33 Fed. Appx. 705 (5th Cir. Mar. 7, 2002). Such claims similarly have been asserted against a wide varietty of public and private employers. *See, e.g., Bejil v. Ethicon Inc.*, 269 F.3d 477 (5th Cir. 2001) (claims for donning and doffing of outer garments by employees engaged in the manufacture of medical supplies); *Bagrowski v. Md. Port Auth.*, 845 F. Supp. 1116 (D. Md. 1994) (claim by Port Authority police officers for time spent donning uniforms); *Reich v. N.Y. City Transit Auth.*, 45 F.3d 646 (2nd Cir. 1995) (Transit Authority police officers asserted claims for dog handling duties and commuting time before and after their regular work shift); *Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984) (claims for pre-shift activities by employees of Army Corps of Engineers who operated hydroelectric facilities); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 750 F.2d 47 (8th Cir. 1984) (truck drivers asserted claim for pre-trip activities); *Dunlop v. City Elec.*,

Inc., 527 F.2d 394 (5th Cir. 1976) (claims asserted by electricians for compensation for various pre-shift activities); *Carter v. Panama Canal Co.*, 463 F.2d 1289 (D.C. Cir. 1972) (locomotive engineers sought compensation for walking time prior to shift); *Blum v. Great Lakes Carbon Corp.*, 418 F.2d 283 (5th Cir. 1969) (employees engaged in manufacture of carbon sought compensation for time spent performing post-shift activities); *Ralph v. Tidewater Constr. Corp.*, 361 F.2d 806 (4th Cir. 1966) (operating engineers and iron workers employed in construction of Chesapeake Bay Bridge sought compensation for daily boat trip to and from place of work); *Cherup v. Pittsburgh Plate Glass Co.*, 350 F. Supp. 386 (N.D. W. Va. 1972), *aff'd by* 480 F.2d 921 (4th Cir. 1973) (chlorine manufacturing employees sought compensation for pre- and post-shift clothes changing); and *Nardone v. Gen. Motors, Inc.*, 207 F. Supp. 336 (D.N.J. 1962) (claims for pre-and post-shift activities of automotive manufacturing employees). Recent claims asserted against Honda Manufacturing of Alabama and Mercedes-Benz U.S. International for compensation for pre-shift and post-shift activities demonstrate the continued and rapidly growing prevalence of these issues in an ever-expanding diverse range of industries. Daily Labor Report (BNA) p. A-8 (Jan. 9, 2003); Daily Labor Report (BNA) p. A-5 (Apr. 4, 2003).

The drastic redefinition of the compensable workday advocated by petitioners would create large and unforeseen liabilities for both public and private employers. In fact, any employer that employs individuals who wear common types of protective attire may be subject to claims for walking and travel time associated with obtaining, donning, doffing, or disposing of such attire. As the First Circuit recognized below, unless walking time is excluded by the Portal-to-Portal Act, "an almost endless number of activities that precipitate the employees' essential tasks would be compensable." *Tum*, 360 F.3d at 282. Additionally, police officers and other public employees required to wear some type of uniform will

likely seek compensation for walking or travel time following allegedly compensable donning activities or preceding allegedly compensable doffing activities. The unanticipated burden such claims would create for state and local governments would be substantial.

II. THE COURT'S OPINION IN *STEINER V. MITCHELL* PROVIDES NO SUPPORT FOR THE REDEFINITION OF THE COMPENSABLE WORKDAY ADVOCATED BY PETITIONERS.

Petitioners and supporting *amici* rely principally upon this Court's decision in *Steiner v. Mitchell*, 350 U.S. 247 (1956). In *Steiner* the employees worked in a storage battery plant where they were exposed to lead, acid and other caustic and toxic substances and were required by their employer to spend approximately 30 minutes per day changing clothes and showering at the end of the shift. *Id.* at 248. Interpreting the general definition of preliminary and postliminary activities in section 4(a)(2) of the Portal-to-Portal Act (but, significantly not the express and specific language of section 4(a)(1)), the Court found that, under the extreme circumstances present in battery manufacturing, the clothes changing and showering were "integral and indispensable" to the employees' principal activities and were therefore compensable. *Id.* at 249. The Court recognized, however, that under section 4(a)(2) clothes changing and showering would not be compensable in "normal" circumstances. *Id.*

A. The Rationale of *Steiner* Cannot Be Applied to Section 4(a)(1) Activities Such As "Walking"

Section 4(a)(1) of the Portal-to-Portal Act specifically identifies as "[a]ctivities not compensable" "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform." 29 U.S.C. § 254(a)(1).

The Court in *Steiner* did not address walking time and in fact made clear that the "integral and indispensable" analysis had no application to activities such as walking that are expressly excluded by section 4(a)(1). The Court held in *Steiner* that:

> activities performed either before or after the regular work shift, on or off the production line, are compensable under the portal-to-portal provisions of the Fair Labor Standards Act if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are *not specifically excluded by section 4(a)(1).*

350 U.S. at 256. (Emphasis added) Therefore, only where an otherwise preliminary or postliminary activity is both "integral and indispensable" and not within the exclusion of section 4(a)(1) can it be argued under *Steiner* that such an activity is compensable. Because the walking time at issue in this litigation is clearly "walking" it is not compensable under the rationale of *Steiner* or any other interpretation of the Portal-to-Portal Act.

B. The Walking And Waiting Time At Issue Are Noncompensable Preliminary And Postliminary Activities Under Section 4(a)(2)

Even if section 4(a)(1) of the Portal-to-Portal Act did not expressly exclude the walking time at issue in this litigation, such walking time would nevertheless be excluded as preliminary and postliminary activities. Section 4(a)(2) provides that "activities which are preliminary and postliminary to said principal activity or activities" are not compensable. 29 U.S.C. § 254(a)(2). The waiting time at issue in this case is, moreover, clearly a noncompensable preliminary and postliminary activity under section 4(a)(2).

The regulations promulgated following the Portal-to-Portal Act allow no other interpretation of the statute. 29 C.F.R. § 790.7 (2003) provides in relevant part:

> (f) Examples of walking, riding, or traveling which may be performed outside the workday and would normally be considered "preliminary" or "postliminary" activities are (1) walking or riding by an employee between the plant gate and the employee's lathe, workbench or other actual place of performance of his principal activity or activities. . . .
>
> (g) Other types of activities which may be performed outside the workday and, when performed under the conditions normally present, would be considered "preliminary" or "postliminary" activities, include checking in and out and waiting in line to do so, changing clothes, washing up or showering, and waiting in line to receive pay checks.

29 C.F.R. § 790.7 (f) & (g) (footnote omitted) (Pet. App. 12a-13a, 15a). There is no meaningful distinction between the walking time at issue in this litigation and the example of "walking or riding by an employee between the plant gate and employee's lathe, workbench or other actual place of performance of his principal activity or activities" set forth in the Secretary's regulations. Moreover, the Secretary's regulations, borrowing from *Steiner*, make clear that under "the conditions normally present" waiting time is a noncompensable preliminary activity. The First Circuit appropriately recognized that the regulations indicate "that a reasonable amount of waiting time is intended to be preliminary or postliminary." *Tum*, 360 F.3d at 282. The court noted that "a line must be drawn, otherwise an almost endless number of activities that precipitate the employees' essential tasks would be compensable." *Id.*

The First Circuit further recognized below that "nothing in *Steiner* requires" the conclusion that compensable donning

commences the workday and that the workday continues until the last act of compensable doffing is performed. *Tum* 360 F.3d at 281. Concurring, Chief Judge Boudin recognized the implications of the extension of *Steiner* urged here, noting that "the more serious problem for employers arises in cases such as this one by attempts to extend *Steiner* further to walking and waiting incident to such donning and doffing. This of course may greatly extend the amount of time in question and may seem especially incongruous where the amount of time spent in actually donning and doffing clothes and equipment is generally pretty minimal." *Id.* at 284.

The notion that some preliminary and postliminary activities (as defined by the Portal-to-Portal Act) are integral and indispensable to a principal activity and therefore compensable originated with the Court's decision in *Steiner*. The Portal-to-Portal Act contains no such concept. Contrary to the assertions of the Secretary here, however, the Court in *Steiner* held that such preliminary and postliminary activities are "integral and indispensable" only in extreme and unusual circumstances such as those in *Steiner*.

In its opinion in *Steiner*, the Sixth Circuit found that the showering and clothes-changing activities were compensable, specifically relying on findings by the district court that "[t]he use of sulphuric acid involves the probability of deteriorating the clothing, and in some cases, of burning the skin of those who have occasion to handle it" and that "'[s]torage battery manufacture is recognized by the experts as one of the most hazardous of the lead-using industries.'" *Steiner v. Mitchell*, 215 F.2d 171, 174 (6th Cir. 1954). Thus *Steiner*, like the regulations, makes clear that "preliminary" or "postliminary" activities will be found to be integral and indispensable to the principal activity only in narrow and unique circumstances.

The *Steiner* decision has been widely recognized as a narrow holding limited to its "unique facts." *See Tum*, 360 F3d at 281 (Boudin, C.J., concurring) (observing that in *Steiner*,

"the dangers were extreme and unique to the job"); *Reich v. IBP, Inc.*, 820 F. Supp. 1315 (D. Kan. 1993) (characterizing the *Steiner* decisions as "very narrow and closely tied to the extreme facts presented by the case," including the "toxicity of the materials involved in manufacturing batteries and discussed at length the dangers inherent in working with such materials"); *see also Reich v. N.Y. City Transit Auth.*, 45 F.3d 646, 650 (2nd Cir. 1995) (noting that the Supreme Court found that the activities in *Steiner* were integral and indispensable "given the high risks to employee safety"); *Aguilar v. United States*, 36 Fed. Cl. 560, 566 (1996) (stating that "[t]he exception fashioned in *Steiner* narrowly construed the phrase 'principal activity' and found only a limited exception, expressly compelled by health, hygiene, and safety considerations. *Steiner* went to great lengths to emphasize that changing clothes and showering are not compensable under 'normal' circumstances").

Any potential health risks that might arguably be faced by meat and poultry processing workers are not comparable to those present in *Steiner*, in which employees were exposed to acid, lead, and other corrosive materials. *Steiner*, 350 U.S. at 249-50. The fact that, in the very limited circumstances present in such a hazardous work environment as that described in *Steiner*, pre-shift and post-shift activities can be found to be integral and indispensable to a principal activity in no way supports a conclusion that the walking or waiting time of employees in this case is compensable. Indeed, *Steiner* did not specifically address waiting time and carved out walking time. It is clear that any walking or waiting associated with the donning and doffing activities at issue in this case are neither a principal activity nor integral and indispensable to a principal activity under *Steiner*.

As Chief Judge Boudin recognized below, the Secretary's position set forth in the Department of Labor's (hereinafter "DOL") amicus brief is "a substantial step beyond *Steiner*."

Tum, 360 F.3d at 286. Petitioners therefore urge this court to expand the exception of *Steiner* to the point that the exception will swallow the rule established by the Portal-to-Portal Act. Such a holding would represent a return to the same expansive definition of "compensable activities" that prompted Congress, in 1947, to enact the Portal-to-Portal amendments.

III. NONE OF THE VARYING RATIONALES OFFERED IN SUPPORT OF PETITIONERS' ADVOCATED RETURN TO THE REJECTED REASONING OF *MT. CLEMENS POTTERY* ARE SUPPORTED BY THE LANGUAGE OF THE STATUTE.

That petitioners and their supporting *amici* lack statutory support for the radical and wholesale revision of the concept of the compensable workday which they advocate is most clearly demonstrated by the variety of fictitious rules of law which they have conjured in place of actual statutory support. These varying rationales, however, do share one common characteristic—they are contrary to the language and purpose of the Portal-to-Portal Act.

A. The Statute Does Not Support The "First Principal Activity" Standard Advocated By Petitioners

Petitioners argue that under *Steiner*, "donning and doffing constitute part of the petitioners' principal activities. And because they are the first and last principal activities of the day, the donning and doffing process marks the boundaries of the petitioners' workday" (Pet. Br. at 10.) The Secretary of Labor similarly advocates the "first principal activity" standard as defining the compensable workday. The Secretary asserts that:

> Thus, absent contract or custom, the Portal Act excludes from compensation travel and other preliminary and postliminary activities when they occur before employ-

> ees begin their first principal activity or after they conclude their last principal activity of the day. Travel and other activities that occur between the first and last principal activities of a workday, however, are not excluded from compensation by the Portal Act.

(Br. of the United States as *Amicus Curiae* at 4).

In response to specific questions posed by the First Circuit below, the Secretary submitted a brief setting forth the Secretary's position on the compensability of walking time that follows compensable donning or precedes the last compensable doffing activity. Before the First Circuit, the Secretary advocated a definition of the compensable workday based upon employees' first and last "principal activities." The First Circuit recognized the Secretary's "first principal activity" argument as a "litigation position" and rejected the Secretary's position that the workday began with an employee's first, and ended with an employee's last, principal activity. *Tum*, 360 F.3d at 281. The First Circuit rightly rejected this expansion of compensable activities, recognizing that this reasoning would "undermine" the very purpose of the Portal-to-Portal Act. *Id.* at 281.

With regard to this novel interpretation of the FLSA urged by the Secretary, the First Circuit observed that "[t]he [S]ecretary urges an expansion of the ordinary 'workday' rule in favor of a broader, automatic rule that any activity that satisfies the 'integral and indispensable' test itself started the workday, regardless of context." *Id.* at 280. Citing *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556 (E.D. Tex. 2001), *aff'd*, 44 Fed. Appx. 652 (5th Cir. 2002),[2] and *Reich v. IBP, Inc.*, 38 F.3d 1123 (1st Cir. 1994) the Court further warned that "the Secretary's present litigation position in our

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[2] Fifth Circuit Local Rule 47.5.4 permits citation of unpublished decisions as persuasive authority.

view, pushes so far that it threatens to undermine the Portal-to-Portal Act." *Tum*, 360 F.3d at 281.

The contention that donning and doffing constitute first and last principal activities, and, that the FLSA requires compensation for intervening time spent walking, was expressly rejected by the Tenth Circuit in *Reich v. IBP, Inc.*, 38 F.3d 1123. In *Reich*, the court held that:

> [d]espite having found that putting on, cleaning, and taking off the unique personal protective gear was a compensable work activity, the district court nevertheless declined to hold that these actions were the first and last principal activities of the workday which would commence and toll the running of the timeclock, including "wait and walk time." The district court found that there existed considerable flexibility and personal discretion with regard to the time and speed that these activities took place. . . . Given these circumstances, the district court concluded that the workers should be paid on the basis of reasonable time to conduct these activities not to include "wait and walk time." . . . We affirm . . . the denial of "wait and walk time" related to the above issues.

38 F.3d at 1127.[3] Similarly, as noted by the First Circuit below, the Fifth Circuit affirmed without published opinion a decision dismissing nearly identical claims by poultry work-

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[3] In *Reich v. IBP*, the donning and doffing activities of knife-wielding meat processing employees were found to be compensable, while similar activities of non-knife-wielding employees were found to be noncompensable. 38 F.3d at 1125-26. The interpretation offered by petitioners in this case would create the following anomaly: knife-wielding employees in such circumstances, once they have performed the "first principal activity" of donning would be compensated for waiting time and for time spent walking to the work station. Non-knife-wielding employees in the same workforce, however, would not be compensated for such waiting and walking time because their donning and doffing activities are not compensable. Any interpretation of the statute that yields such a result is clearly in conflict with the statute's plain meaning.

ers for compensation for time spent walking to and from their work stations. *Anderson v. Pilgrim's Pride Corp.*, 147 F. Supp. 2d 556, 563 n.12 (E.D. Tex. 2001), *aff'd*, 44 Fed. Appx. 652 (5th Cir. 2002). The First Circuit's opinion below, *Reich v. IBP*, and *Pilgrim's Pride* reflect a longstanding interpretation of the Portal-to-Portal Act that has persisted over many decades for a good reason—it is faithful to the clear language of the statute.

B. There Is No "Continuous Workday Rule" Which Compels The Interpretation Of The Act Advocated By Petitioners

Petitioner's arguments also rest on the erroneous assertion that "[t]here is nothing in the statute on regulations that would lead to the conclusion that a workday may be commenced, then stopped while the employee is walking to his station, then recommenced when the walking is done." (Pet. Br. at 24-25) (quoting *Alvarez v. IBP,* Inc., 339 F.3d 894, 907 (9th Cir. 2003)). In the history of the FLSA there have been innumerable circumstances in which the DOL and the courts have found that the "workday" is anything but continuous. Indeed, the Secretary's regulations recognize that the "workday" may often be "discontinuous".

The Secretary's regulations have long recognized that work performed away from an employer's premises or at home, after the completion of an employee's normal shift, is compensable. 29 C.F.R. 785.12. (regulations pertaining to working time apply "to work performed away from the premises or the job site, or even at home"). Additionally, the regulations recognize that work performed during travel, but not the travel time itself, is compensable. 29 C.F.R. 785.41.

The "First Principal Activity" standard and "Continuous Workday Rule" asserted by petitioners and supporting *amici* are also in conflict with the opinions of numerous courts of appeals that have rejected such reasoning in addressing the

compensability of travel time for police dog handlers. For example, in *Reich v. N.Y. City Transit Auth.*, 45 F.3d 646 (2nd Cir. 1995), dog handlers employed by the New York Transit Authority Police Department sought compensation for time spent commuting with their dogs. Each handler had sole responsibility for the care of his or her dog and was required to groom, feed, walk, train, house, and otherwise care for the dog. *Id.* at 648. The dog handlers were not permitted to travel to work using public transportation but were required to use their personal vehicles to transport the dogs to and from work. *Id.* The Second Circuit rejected the argument of the Secretary that, because the handlers were required to perform compensable activities related to caring for the dogs, the travel time to and from work was, therefore, compensable. The court concluded that:

> the time spent by handlers driving to and from work with their dogs, except to the extent that actual duties of care, feeding, training, walking or cleaning up occur during such commute, is not compensable work. Such true dog-care work occurring during the commute, however, is not exempted from compensation by the Portal-to-Portal Act.

Id. at 652. Both the Federal Circuit and the Sixth Circuit have reached similar conclusions. *See Bobo v. United States*, 136 F.3d 1465, 1468 (Fed. Cir. 1998), and *Aiken v. City of Memphis*, 190 F.3d 753, 758 (6th Cir. 1999), *cert. denied*, 528 U.S. 1157 (2000). These courts rejected the reasoning of *Graham v. City of Chicago*, 823 F.Supp. 576 (N.D. Ill. 1993), in which the court had applied the "first principal activity" analysis to find that travel time which followed compensable dog care activities was also compensable. The *Graham* analysis has been widely rejected and criticized. *See e.g. Adams v. United States*, 10 WH Cases 2d 1000, 1014 (Fed. Cl. 2005) (observing that "[t]he *Graham* analysis appears to be an interpretation of the Portal-to-Portal Act which is in a distinct minority and is probably no longer good law."); *Dooley v.*

Liberty Mutual Ins. Co., 307 F.Supp. 2d 234, 248 (D. Mass. 2004) (stating that "*Graham* remains, but it is contradicted by extensive case law reaching the opposite conclusion.")

These decisions reject the proposition that the performance of some compensable activity prior to or during travel time (which under § 4(a)(1) is indistinguishable from walking time) commences the workday and renders such travel time compensable. In contrast, under the arguments advanced by petitioners, if a police dog handler's commute to work followed compensable dog care activities, the time spent commuting would be compensable. Under section 4(a)(1) of the Portal-to-Portal Act, there is no distinction between time spent "walking," "riding," or "traveling," to a workplace. 29 U.S.C. § 254(a). This is precisely the type of "absurd" result the First Circuit below recognized would follow from the reasoning of the Secretary. The court observed that "[t]his extension overreaches and would lead to the absurd result that an employee who dons required equipment supplied by the company at 5:00 a.m., at this home, starts his workday for FLSA purposes at 5:00 a.m.—even though he is not required to punch in to work and does not punch in until 8:00 a.m. This plainly cannot be what Congress intended." *Tum*, 360 F.3d at 280-81.

The concept of a universally mandatory "continuous workday" is a figment of petitioners' imagination. To the contrary, as found by the First Circuit below, the Tenth Circuit in *Reich v. IBP*, and the Second Circuit in *Reich v. N.Y. City Transit Auth.*, time spent traveling to or from the place where one's principal work is performed is not rendered compensable as a result of the previous or intermittent performance of pre or post-shift compensable duties. Consistent with this reasoning, the Secretary's regulations additionally provide that:

> [w]ashing up after work, like the changing of clothes, may in certain situations be so directly related to the

> specific work the employee is employed to perform that it would be regarded as an integral part of the employee's "principal activity." . . . This does not necessarily mean, however, that travel between the washroom or clothes-changing place and the actual place of performance of the specific work the employee is employed to perform, would be excluded from the type of travel to which section 4(a) refers.

29 C.F.R. § 790.7, n.49 (Pet. App. 15a). The arguments of the petitioners and their supporting *amici* (which include the DOL) are difficult to reconcile with this longstanding regulation upon which employers have relied for decades.

Apparently recognizing the vast liabilities that would result from judicial adoption of the "first principal activity" standard, the Secretary offers to mitigate its effects by conceding that "when an employee has the option to don and doff required clothing and gear at home, that activity is not integral, not compensable, and does not begin or end the workday." (Br. of the United States as *Amicus Curiae* at page 23). The problem with this exception to the "first principal activity" standard is that, like the first principal activity standard itself, it is not supported by the statute and is contradicted by the Secretary's regulations.

As discussed below, an action that is a "principal activity" is compensable under the Portal-to-Portal Act unless it is *de minimis*. That it is performed at home is of no consequence under the Secretary's regulations (*see* 29 C.F.R. 785.12 discussed above) and numerous well reasoned cases (*see Reich v. New York Transit Authority*, 45 F.3d 646 and related cases discussed above). There is no statutory basis for treating principal activities performed at home differently than principal activities performed at the job site. Neither the FLSA nor the Portal-to-Portal amendments make such a distinction. Moreover, the effort required to perform any donning or doffing is identical whether such activity occurs at home or

on the employer's premises. The First Circuit recognized the fallacy of the Secretary's proffered exception to the first principal activity standard observing that "[t]he Secretary offers a fallback position that the workday starts with any donning or doffing of required gear so long as it is done on company property. But the logic of the Secretary's position does not permit such a narrowing, nor does the Secretary's fallback argument make sense in a world, for example, in which not all employees who perform work that is compensable under the FLSA do so at a facility owned and run by their employer." *Tum*, 360 F.3d at 281.

At the time the Portal-to-Portal Act was passed, or at anytime since, Congress could have adopted "a continuous workday rule" or a "first principal activity" standard for determining the scope of the compensable workday. Congress, however, has not done so. Such a radical revision of the compensable workday could only be accomplished through legislative action—not judicial fiat. This is particularly true where the revision of the statute being advocated is directly contrary to the purpose which prompted Congress to enact the Portal-to-Portal Act in the first place. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-89 (1951).

IV. THE "FIRST PRINCIPAL ACTIVITY" OR "CONTINUOUS WORKDAY" STANDARDS ADVOCATED BY PETITIONERS WOULD ERADICATE THE *DE MINIMIS* RULE.

The rule that *de minimis* activities are not compensable under the FLSA, even when such activities are integral and indispensable to a compensable activity, has a long history. This Court recognized the *de minimis* concept in *Mt. Clemens*. In *Mt. Clemens* the court observed that:

> [w]e do not, of course, preclude the application of a *de minimis* rule where the minimum walking time is such as to be negligible. The workweek contemplated by § 7(a)

> must be computed in light of the realities of the industrial world. When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act.

328 U.S. at 692. The regulations also provide that insignificant periods of time outside of an employee's normal working hours may be disregarded. 29 C.F.R. §785.47. Courts have on numerous subsequent occasions applied the *de minimis* rule to find that preliminary or postliminary activities were not compensable, even where such activities were found to be integral and indispensable as defined in *Steiner*. *See e.g. Aiken v. City of Memphis*, 190 F.3d 753, 759 (6th Cir. 1999), *cert. denied*, 528 U.S. 1157 (2000); *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984).

If the interpretation of the FLSA advocated by petitioners could be supported by the statutory language, the *de minimis* rule could never have come into existence and certainly would not have persisted throughout six decades of subsequent application. If the Court were to adopt the radical revision of the FLSA advocated by petitioners, however, the *de minimis* rule would thereby be abolished. If associated walking and waiting time were to be aggregated with preliminary or postliminary donning and doffing activities, it is difficult to conceive of any circumstances under which the *de minimis* rule would have any further application. The clear language of § 4 of the Portal-to-Portal Act does not require or even allow such an absurd result. Rather, the court below properly applied the long standing *de minimis* rule to find that the activities at issue in this case were not compensable.

Petitioners here seek to upend longstanding precedent to achieve a windfall. It was recognized in the Congressional debate which produced the Portal-to-Portal amendments and

has been recognized by this Court that any such windfall would be short-lived. *Mt. Clemens*, 328 U.S. at 698 (J. Burton, dissenting); *Jewell Ridge Coal Corp.*, 325 U.S. at 169, 176. Any employer which has established its wage rates in reliance upon longstanding interpretations of the FLSA which excluded walking and waiting time from the compensable workday will, if the workday is redefined as advocated by petitioners, simply revise wage rates accordingly. Revised wage rates would be necessary to offset the costs associated with longer periods of heretofore non-compensable time as well as costs associated with revising timekeeping practices and systems to capture time spent performing ancillary activities. Petitioners even go so far as to suggest that employers should be burdened with redesigning their workplaces so that walking and waiting time can be monitored with precision (Pet. Br. at 33). It should be noted, moreover, that such costs would be imposed on large and small employers as well as public and private employers.

The effects of the revision of the concept of the compensable workday advocated by petitioners would be profound and widespread. As Justice Burton recognized in *Mt. Clemens*, for the Court to include in the compensable workweek "items that have been customarily and generally absorbed in the rate of pay but excluded from measured working time is not justified in the absence of legislative action." 328 U.S. at 698 (J. Burton, dissenting).

CONCLUSION

For the foregoing reasons, *amici* organizations respectfully urge the Court to reverse the judgment of the Ninth Circuit in *Alvarez*, and affirm the judgment of the First Circuit in *Tum*.

Respectfully submitted,

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August 1, 2005

(9)

Court, U.S.
AUG 1, 2005

No. 04-66

IN THE

Supreme Court of the United States

ABDELA TUM, *et al.*,

Petitioners,

v.

BARBER FOODS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT

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CORPORATE DISCLOSURE STATEMENT

Barber Foods is a privately held corporation. It has no parent company and there are no publicly held companies owning 10% or more of the corporation's stock.

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STATEMENT OF THE CASE

1. This is a collective action pursuant to the provisions of Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), brought by a group of current and former employees of Barber Foods seeking compensation for alleged unrecorded and uncompensated work in the form of certain pre- and post-shift activities performed by them. Partial summary judgment was granted in favor of Barber Foods, Pet. App. 20a-50a, and judgment was entered in favor of Barber Foods on the remaining claims after a jury trial. Petitioners appealed the judgment to the Court of Appeals for the First Circuit which, after rehearing, affirmed the judgment in all respects. *Tum v. Barber Foods, Inc.*, 360 F.3d 274 (1st Cir. 2004); Pet. App. 1a-19a. Petitioners filed a petition for a writ of certiorari on July 8, 2004. This Court granted the petition in part on February 22, 2005.

2. Barber Foods is a further processor of poultry-based products. It has no slaughtering, butchering, or deboning operations. It purchases boneless chicken breast in bulk and processes that raw material into finished products such as stuffed entrees, chicken fingers, and nuggets. The Petitioners fall within four general job classifications: rotating associates who staff the production lines, set-up operators who tend the various machines on the line, meatroom associates who work where the raw product is blended with ingredients, and shipping and receiving associates. J.A. 39-40. All associates are required to wear a lab coat, hairnet, earplugs, and safety glasses while on the production floor. There are other items of clothing or equipment worn by some associates for comfort, sanitary, or safety reasons. Depending upon job classification, assignment, and personal preference, some combination of the following may be worn: vinyl gloves, cotton glove liners, vinyl aprons, sleeve covers, bump hats, back belts, and safety boots. J.A. 43.

Rotating associates are required to wear lab coats, hairnets, earplugs, and safety glasses. The lab coat, hairnet, and earplugs must be on before they can punch in and until they punch out. Safety glasses and any items that they choose but are not required to wear, such as gloves, aprons, and sleeve covers, can be donned after punching in and doffed before punching out. J.A. 45, 50-51. Set-up operators must wear lab coats, hairnets, earplugs, safety glasses, safety boots, bump hats, and back belts. Any other items they choose to wear may be donned after punching in and doffed before punching out. J.A. 45, 51-52. Meatroom associates are required to wear lab coats, hairnets, earplugs, safety glasses, safety boots, backbelts, aprons and vinyl gloves. Many also choose to wear sleeve covers. The apron, gloves and sleeve covers can be donned after punching in and before punching out. J.A. 45-46, 52. Shipping and receiving associates are required to wear safety boots, hard hats and backbelts. They generally don these items before punching in and doff them after punching out. Their time clock is located on the production floor, so they must don and doff a lab coat, hairnet, and earplugs briefly to enter the production floor to punch in and out. J.A. 46, 52-53.

Lab coats and cotton glove liners are obtained by associates in the hallway between the entranceway and the equipment cage. The lab coats are on hanger racks and the glove liners are in tubs. Hairnets, earplugs, vinyl gloves, sleeve covers, and aprons are dispensed from the window of the equipment cage. Vinyl gloves, sleeve covers, and aprons are also available from tubs on the production floor. Bump hats, back belts, safety glasses, safety boots, and reusable earplugs are dispensed once and then replaced as needed. J.A. 43-44.

Lab coats and cotton glove liners are laundered and reused. Laundry bins are located along the hallway from the production floor exits to the plant exits and associates drop the coats and liners in these bins on their way out of the plant . Vinyl gloves, sleeve covers and aprons are disposable. Trash bins are located on the production floor and along the hallways from the production floor exits to the plant exits. These items may be removed and deposited in the trash bins on the production floor before punching out if the associate chooses. Bump hats, back belts, safety glasses, safety boots, and reusable earplugs are retained by associates and may be stored in their locker or taken home. J.A. 47.

Associates are expected to be on the production floor ready to work when their shift begins. They are paid from the time they actually punch in to a computerized time-keeping system. Each associate has a swipe card. Time clocks are located at the entrances to the production floor. Rotating associates, set-up operators, and meatroom associates punch in at a clock in the area where they will be working and punch out on clocks which are located next to the two primary exits from the production floor. Shipping and receiving associates punch in and out on the plant office clock located on the production floor by the shipping and receiving office. Associates are paid from the moment they punch in. They are allowed twelve minutes of "swing time", meaning that they can punch in up to six minutes early and get paid from that time or up to six minutes late without incurring an attendance violation. J.A. 42, 48.

There is a great deal of flexibility and personal discretion among associates as to when and where they don and doff their clothing and gear. Pre-shift, some associates arrive early, pick up their clothes, and then go to the cafeteria to socialize; some don their clothes before going to the cafeteria, some

after; some go to the lockers and don their clothes there, others do not use lockers; some don their clothes as soon as they retrieve them, others don them right before entering the production floor, and others don them along the way. The only requirement is that they be on the line ready to go when the shift starts. Post-shift, associates doff their clothes at various points en route to the exits. Some items may be thrown in the trash on the production floor before punching out. After punching out there are trash receptacles and laundry bins all along the hallway from the production floor exit to the plant exit. Some associates drop their items in the first available bin off the production floor while others use the last one before the plant exit. J.A. 49-52.

3. Petitioners brought this collective action contending that they were entitled to compensation for the following activities: (1) donning and doffing of all clothing and equipment required by Barber Foods or government regulation as well as any optional gear "necessitated by working conditions"; (2) time spent walking to and from their work stations on the production floor after donning and before doffing such gear; and (3) time spent waiting to obtain any clothing and equipment from the equipment cage or other distribution station and time spent waiting to punch in at the time clocks after donning such clothing and equipment.

Barber Foods moved for summary judgment in its favor on all claims. In a recommended decision affirmed by the district court, the magistrate judge made two rulings central to the present appeal. With respect to donning and doffing, the court concluded that "the donning and doffing of clothing and equipment required by the defendant or by government regulation, as opposed to clothing and equipment which employees choose to wear or use at their option, is an integral part of the plaintiffs' work for the defendant" and thus "are

not excluded from compensation under the Portal-to-Portal Act as preliminary or postliminary activities." *Tum v. Barber Foods Inc.*, 2002 WL 89399, at *9, 10 (D. Me. 2002); Pet App. 36a-37a, 40a. With respect to walking and waiting time, the court ruled that Barber Foods

> is entitled to summary judgment on any claims based on time spent walking from the plant entrances to an employee's workstation, locker, time clock or site where clothing and equipment required to be worn on the job is to be obtained and any claims based on time spent waiting to punch in or out or for such clothing or equipment.

Id. at *8; Pet. App. 33a-34a.

A trial was held on the amount of time reasonably spent engaged in donning and doffing the required clothing and equipment in the relevant job categories and whether that time was *de minimis*. The jury found that the combined donning and doffing times ranged from one minute for rotating associates to two minutes sixteen seconds for set-up operators and determined that this time was *de minimis*. Petitioners appealed.

The First Circuit affirmed. 331 F.3d 1 (1st Cir. 2003). A petition for rehearing was granted, the original judgment was vacated, and a new opinion issued, again affirming the district court in all respects. *Tum v. Barber Foods, Inc*, 360 F.3d 274 (1st Cir. 2004); Pet. App. 1a-19a. The court of appeals agreed that the donning and doffing of required gear is an integral and indispensable part of the employees' principal activities and, in the absence of the jury's *de minimis* finding, would have been compensable, *Id.* at 279, Pet. App. 7a, but concluded that all of the other activities at issue in the case, including the donning and doffing of non-required gear, time

spent waiting to obtain required clothing and gear and to punch in at time clocks after donning such gear, and time spent walking to and from the employees' work stations after donning and before doffing required gear, were preliminary and postliminary activities exempted from compensation by the Portal-to-Portal Act. *Id.* at 280-82; Pet App. 8a-12a. Petitioners filed a petition for certiorari which was granted in part.

SUMMARY OF ARGUMENT

1. Barber Foods' employees are paid from the time they punch in at time clocks at the beginning of the shift until they punch out at time clocks at the end of the shift. The time clocks are located on the production floor, which is on the second floor of the facility, in close proximity to the work areas. Before entering the production floor all employees must have on certain safety and sanitary equipment. This clothing and equipment is obtained from distribution stations or retrieved from lockers, both of which are located on the first floor.

2. The First Circuit held that the time employees spend walking to and from the time clocks after obtaining required clothing and equipment and before doffing the same is noncompensable preliminary and postliminary activity. This ruling is clearly correct. It is a straightforward application of the plain terms of the statute, and achieves a result most consistent with the underlying purpose and intent of the Portal Act.

Section 4(a)(1) of the Act provides that employers are not obligated to compensate employees for "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" where such walking "occur[s] either

prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. § 254(a)(1). The principal activity that the employees are "employed to perform" is processing chicken, not donning and doffing clothing and equipment. The "actual place of performance" of this activity is the production floor, not the distribution stations or locker rooms. Thus, by a straightforward application of the plain and ordinary meaning of the language of the statute, the time spent walking to and from the time clocks after obtaining required clothing and equipment and before doffing that gear is not compensable.

The interpretive regulations confirm this reading of section 4(a)(1). They state that "[t]he 'principal' activities referred to in the statute are activities which the employee is 'employed to perform'", 29 C.F.R § 790.8(a), and define the 'workday' as "the period between the commencement and completion on the same workday of an employee's principal activity or activities." *Id.* § 790.6(b). The regulations also describe the 'workday' as the period "from whistle to whistle", *id.*, § 790.6(a), and state that "[i]f an employee is required to report at the actual place of performance of his principal activity at a certain specific time his 'workday' commences at the time he reports there." *Id.* § 790.6 (b). There is a great deal of flexibility and personal discretion among employees as to when they arrive at the plant and when they don and doff their gear. The only specific requirement is that they be on the line ready to go when the shift starts and even as to that requirement there is a 12-minute 'swing period'. "From whistle to whistle" in this case is the start and stop of the scheduled shift, from the time the employees punch the clock in the production area until they punch it to leave, when they are performing the principal

activity – processing chicken – which they are "employed to perform." Section 4(a)(1) expressly exempts from mandatory compensation all walking to and from that point.

Petitioners argue that the First Circuit's decision violates the 'continuous workday' rule. The Portal Act does not affect the computation of hours worked within the workday. In *Steiner v. Mitchell*, 350 U.S. 247 (1956), this Court held that ". . . activities performed either before or after the regular work shift, on or off the production line, are compensable . . . if those activities are an integral and indispensable part of the principal activities for which covered workmen are employed and are not specifically excluded by Section 4(a)(1)." *Id.* at 256. In this case, it has been determined that the donning and doffing of required gear is an integral and indispensable part of the principal activities. Pet. App. 7a. Therefore, Petitioners argue, the workday must be bounded by these activities and any walking that occurs after donning and before doffing occurs during the workday and is outside of the scope of Section 4(a)(1). They contend that this conclusion is compelled by the regulations and the *Steiner* decision.

There are several flaws in this argument. First, it reads too much into the *Steiner* decision. *Steiner* involved the application of the provisions of Section 4(a)(2) and did not address the issue of when the workday commences for purposes of determining the compensability of pre- and post-shift walking under Section 4(a)(1). This Court expressly stated that its holding concerning the compensability of pre- and post-shift activities which are "an integral and indispensable part of the [employees'] principal activities" did not include activities which are "specifically excluded by Section 4(a)(1)." *Id.* at 256. Second, the First Circuit

decision neither rejects nor violates the 'continuous workday' principle; it simply disagrees with Petitioners as to when that workday commences under the circumstances of this case. Petitioners argue that once it was determined that donning and doffing of required gear is an integral and indispensable part of the principal activities, it necessarily must follow that the workday is bounded by the donning and doffing activities. However, the interpretive regulations clearly contemplate that walking to and from "the actual place of performance of the specific work the employee is employed to perform" may be noncompensable even if it occurs between compensable donning and doffing. 29 C.F.R. § 790.7(g) n.49. Third, to include the walking involved in this case within the compensable workday would undermine the primary purpose of the Portal Act, which was to exempt from compensation the time spent walking from the plant entrance to an employee's workstation. As Judge Boudin observed in his concurring opinion, "the situation does bear an uncanny resemblance to that which prompted the Portal-to-Portal Act." Pet. App. 19a.

3. The First Circuit also determined that the time employees may spend in line to obtain required clothing and gear is noncompensable preliminary activity. "If an employee is required to report at the actual place of performance of his principal activity at a certain specific time", his compensable workday commences at that time and place. 29 C.F.R. § 790.6(b). The only requirement in this case is that the employees be on the line at their workstations ready to go when the shift starts and even as to that requirement they are allowed up to twelve minutes of "swing time", meaning they can punch in up to six minutes early and get paid for that time or up to six minutes late without incurring an attendance violation. Depending upon when they arrive at the plant, some may experience a short wait to obtain their gear while others

do not have to wait at all. The interpretive regulations clearly contemplate that some pre-shift waiting time is to be regarded as noncompensable preliminary activity. *Id.* §§ 790.7(g), 790.8(c). Consistent with the intent of the regulations and the underlying purpose of the Portal Act which, in addition to its specific exemption for walking and traveling time, was "intended to relieve employers from liability for preliminaries, most of them relatively effortless, that were thought to fall outside the conventional expectations and customs of compensation," *Reich v. New York City Transit Authority*, 45 F.3d 646, 649 (2nd Cir. 1995), the First Circuit correctly concluded that time spent waiting to obtain required clothing and gear is noncompensable preliminary activity.

ARGUMENT

I. Scope and Coverage of the Portal Act

The Fair Labor Standards Act requires an employer to compensate employees for all of the time which the employer requires or permits employees to work. 29 U.S.C. § 201 *et seq*. "Work" under the FLSA has been defined as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). Waiting time may also be work when an employee is "engaged to wait" instead of "wait[ing] to be engaged." *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944). Generally, work under the FLSA includes "all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 690-91 (1946).

In *Mt. Clemens*, the Court held that walking to and from time clocks located near the plant entrance to the employees' workstations before and after the regular shift was compensable work. 328 U.S. at 690-91. *Mt. Clemens* also held that employees were entitled to compensation for certain "preliminary" activities performed after arriving at the workplace but before beginning their principal work activities, including "putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger cots, preparing the equipment for production work, turning on switches for lights and machinery, opening windows, and assembling and sharpening tools." *Id.* at 692-93.

The Portal Act was enacted in response to the *Mt. Clemens* decision. Under Section 4 of the Act, employers are not obligated to compensate employees for "walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform," § 4(a)(1), or for "activities which are preliminary or postliminary to said principal activity or activities," § 4(a)(2), where such traveling or activities "occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. § 254(a).

In *Steiner v. Mitchell*, 350 U.S. 247 (1956), the Court held that activities performed either before or after the regular shift are compensable "if those activities are an integral and indispensable part of the [employees'] principal activities . . . and are not specifically excluded by Section 4(a)(1)," *Id.* at 256. As an activity "specifically excluded by Section 4(a)(1)," walking to and from the actual place of performance

of the principal activity an employee is employed to perform is expressly excluded from the scope of the *Steiner* holding.

With respect to activities other than walking or traveling which are performed before or after the regular shift, an activity may be a noncompensable preliminary or postliminary activity under section 4(a)(2) even though it is compensable work in the absence of the Portal Act. In other words, the fact that an activity may constitute "work" under the *Tennessee Coal* definition does not necessarily mean that the activity must be either a principal activity or integral and indispensable to a principal activity. A primary objective of section 4 was to relieve employers from the obligation to compensate employees for certain preliminary and postliminary activities that would otherwise be compensable "should [they] continue to be tested solely by existing criteria for determining compensable worktime," 29 C.F.R. § 790.4(a)(1), and the only possible reason such activities would be otherwise be compensable is if they constituted "work". *See also*, *id.* § 790.2(a) (Section 4 "contemplates that employers will be relieved, in certain circumstances, from liabilities . . . to which they might otherwise be subject under the [FLSA]"); *Id.* § 790.4(a)(Section 4 "relieves the employer from certain liabilities . . . to which he might otherwise be subject under the provisions of the [FLSA]"). Thus, with respect to activities taking place before and after the regular shift, the concepts of "work" and noncompensable preliminary or postliminary activities are not mutually exclusive.

II. The Time that Employees Spend Walking to and From the Production Floor after Obtaining Required Clothing and Equipment and before Doffing that Gear is Not Compensable under Section 4(a)(1) of the Portal Act.

A. Nature of the Walking Time at Issue

Barber Foods' employees are paid from the time they punch in at time clocks at the beginning of the shift until they punch out at time clocks at the end of the shift. The time clocks are located on the production floor, which is on the second floor of the facility, in close proximity to the work areas. Before entering the production floor, all employees must have on certain safety and sanitary equipment. This clothing and equipment is obtained from distribution stations or retrieved from lockers, both of which are located on the first floor.[1] Petitioners contend that they are entitled to compensation for the time spent walking from the first distribution station to the time clocks at the beginning of the shift and from the time clocks to the point where the last item of required gear is doffed at the end of the shift, including any walking to or from the locker rooms. Before discussing the compensability of this walking time, it is necessary to correct a misconception concerning the nature of the walking time at issue in this case.

Petitioners repeatedly refer to the donning and doffing 'process', describe the walking at issue as part of that 'process', and assert that the walking is necessitated by and undertaken "solely in order to complete the required donning

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1. The physical layout of the production floor and the first floor with production areas, entrances and exits, time clocks, equipment cage, and other referenced locations identified, is set forth in Trial Exhibits 1 and 2.

and doffing." Pets. Br. 13, 37. This is not so. The walking in this case is necessitated by the fact that the plant entrance is on the first floor and the production area is on the second floor. Some of the walking may take place after donning and before doffing, but the same path to and from the production floor must be traversed in any event and the walking is in no way necessitated by or undertaken in order to complete any required donning or doffing.

There are two hallways and sets of stairs by which employees may proceed from the plant entrance to the production floor. The so-called distribution stations, which consist of coat racks, tubs, and an equipment cage are located in one hallway.[2] The stairwell to the production floor is right beside the equipment cage window, which is right around the corner from the coat racks and tubs. The laundry and trash bins into which discarded items are placed post-shift are located along both hallways. An employee who obtains items from the coat racks, tubs and cage on his way to the floor before his shift and who discards items in the laundry and trash bins on his way from the floor after his shift has not walked any further then someone who walked to and from the floor without obtaining, donning, doffing or discarding anything. An employee who uses a locker does make a slight detour from these paths, but the detour is truly slight and, in any event, the lockers are provided for the convenience of the employees and their use is optional. The walking in this case may follow donning and precede doffing, but it is not necessitated by or undertaken in order to complete any required donning or doffing.

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2. Items such as gloves, sleeve covers, and aprons, optional for all employees except those who work in the meatroom, are also available from tubs located in the production areas, but the employees are already punched in and on the clock at that point.

B. The Plain Language of Section 4(a)(1) Expressly Excludes the Walking Time at Issue from Compensable Working Time.

"A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1944). Section 4(a)(1) of the Portal Act provides that employers are not obligated to compensate employees for "walking . . . to and from the *actual place of performance* of the principal activity or activities which such employee is *employed to perform*," 29 U.S.C. § 254(a)(1), where such walking "occur[s] either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, *such* principal activity or activities." *Id.* § 254(a)(emphasis supplied). A straightforward application of the plain and ordinary meaning of this statutory language excludes from compensable working time the walking at issue in this case.

To be exempted from compensable working time, the walking must occur before the employee commences or after he ceases "such" principal activity or activities. The adjective "such" is clearly referring to the "principal activity or activities" described earlier in the section, those which the employee is "employed to perform." The term "principal" is not defined in the statute, but its most common definition is "chief" or "most important." *See, Webster's New Universal Unabridged Dictionary* 1430 (2nd Ed. 1983). Giving the term its common definition, the principal activity that the employees are "employed to perform" is processing chicken, not donning and doffing clothing and equipment. The "actual place of performance" of this principal activity is the production floor, not the coat racks or equipment cage. Thus,

by its plain and ordinary terms, section 4(a)(1) expressly exempts from compensable working time, the time that employees spend walking from the plant entrance to and from the production floor, where they punch in to start their compensable workday and punch out to end it.

C. The Interpretive Regulations Confirm that the Primary Purpose of Section 4(a)(1) Was to Exclude from Compensable Working Time an Employee's Travel between the Plant Entrance and the Workstation Where He Performs the Specific Work He Is Employed to Perform, Prior to the Beginning and Subsequent to the End of His Scheduled Shift.

The interpretive regulations confirm that the primary purpose of Section 4(a)(1) is to exempt from compensable working time an employee's travel at the beginning and end of the shift between the plant entrance and the location in the plant where he engages in the specific work he is employed to perform. They provide that "[t]he 'principal' activities referred to in the statute are activities which the employee is 'employed to perform'," 29 C.F.R. § 790.8(a), and define the workday as "the period between the commencement and completion on the same workday of an employee's principal activity or activities." *Id.* § 790.6(b). The regulations also describe the 'workday' as the period "from whistle to whistle", *id.* § 790.6(a), and state that "[i]f an employee is required to report at the actual place of performance of his principal activity at a certain specific time, his 'workday' commences at the time he reports there." *Id.* § 790.6(b). The inclusion of the phrase "actual place of performance" in section 4(a)(1):

> thus *emphasizes* that the ordinary travel at the beginning and end of the workday to which this

> section relates includes the employee's *travel on the employer's premises until he reaches his workbench* or other place where he commences the performance of the principal activity or activities, *and the return travel from that place at the end of the workday.*

Id. § 790.7(e)(emphasis supplied). Another regulation notes that both the statutory language and the legislative history indicate that the walking to which Section 4(a)(1) refers "is that which occurs, whether on or off the employer's premises, in the course of an employee's ordinary daily trips between his home or lodging and *the actual place where he does what he is employed to do.*" *Id.* § 790.7(c)(emphasis supplied). *See also, id.* § 790.7(f)(1).

Petitioners contend that where, as in this case, it has been determined that the donning and doffing of required clothing and equipment is an integral and indispensable part of the employee's principal activities, the workday must invariably commence with the performance of those activities and the "actual place of performance" of those activities are the locations where employees don and doff required gear, thus excluding from section 4(a)(1)'s reach any walking that occurs after donning and before doffing.[3] However, the interpretive regulations clearly contemplate that Section 4(a)(1) may exempt walking to and from "the actual place of performance of the specific work the employee is employed to perform" even if it occurs between compensable donning and doffing. *Id.* § 790.7(g) n.49. Section 4(a)(1) refers to walking to and from "the actual place of performance of the *principal activity or activities* which such employee is employed to perform." Footnote 49 refers to "the actual place

3. A more extensive response to this 'continuous workday' argument is contained in Section II.E of the brief, *infra* at 24-32.

of performance of the *specific work* the employee is employed to perform." By paraphrasing the statutory language and substituting the words "specific work" for the term "principal activity or activities", the regulation clearly equates "principal activity or activities," as used in section 4(a)(1), with the "specific work" the employee is employed to perform and distinguishes that "specific work" from compensable donning and doffing, thus recognizing that donning and doffing of required clothing, even if integral and indispensable to the principal activity, is not necessarily the principal activity or activities to which section 4(a)(1) refers, and that the "actual place of performance" referred to in that section is the place where the employee performs the specific work he is employed to perform, not the location where he dons and doffs required clothing. Section 4(a)(1) was intended to exempt from compensable working time the walk to and from that place at the beginning and end of the workday.

There is a great deal of flexibility and personal discretion among employees as to when they arrive at the plant and when and where they don and doff their gear. The only specific requirement is that they be on the line ready to go when the shift starts and even as to that requirement there is a 12-minute 'swing period'. The workday in this case is the period "[f]rom whistle to whistle," from the time the employees punch in to start the shift until they punch out to end it, *id.* § 790.6(a), when they are required to be on the line ready to work. *Id.* § 790.6(b). Their principal activity, the specific work they are employed to perform, is processing chicken, and the actual place of performance of that principal activity is the production floor. *Id.* § 790.7(c), (e), (f)(1), (g) n.49. Section 4(a)(1), as confirmed by the interpretive regulations, exempts from compensable working time the walk to and from that place at the beginning and end of the workday.

D. The Legislative History of the Portal Act Confirms that the Primary Purpose of Section 4(a)(1) was to Exclude from Compensable Working Time an Employee's Travel Between the Plant Entrance and the Workstation where He Performs the Specific Work He is Employed to Perform, Prior to the Beginning and Subsequent to the End of his Scheduled Shift.

In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946), the Court held that walking to and from time clocks located near the plant entrance and the employees' workstations before and after the regular shift was compensable work. *Id.*, at 690-91. Observing that "[w]ithout such walking on the part of the employees, the productive aims of the employer could not have been achieved" and that the employees "walked on the employer's premises only because they were compelled to do so by the necessities of the employer's business," the Court reasoned that it necessarily followed that the time spent walking to and from the employees' workstations constituted compensable work under the definition enunciated by the Court in the *Tennessee Coal* case. *Id.* at 691. The Court also held that employees were entitled to compensation for certain "preliminary" activities performed after arriving at the workplace but before beginning their principal activities, including "putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger cots, preparing the equipment for production work, turning on switches for lights and machinery, opening windows, and assembling and sharpening tools." *Id.* at 692-93.

The Portal Act was enacted in response to the *Mt. Clemens* decision. The immediate impetus for the Act was the need to address the flood of litigation prompted by

the decision that if allowed to proceed would create "wholly unexpected liabilities, immense in amount and retrospective in operation." 29 U.S.C. § 251(a). In response to an inquiry as to whether "the purpose of the legislation is to set aside the decision of the United States Supreme Court . . . as to what constitutes compensable work," Senator Donnell, one of the primary sponsors of the legislation, responded:

> The occasion was that in the Mount Clemens case various activities, including walking time and preliminary time, have been held by the Court to be compensable, notwithstanding contrary custom or contract as to the walking time . . . It was exactly as the Senator has said, in order to set aside, annul, and forever cancel and make void these suits which have been filed based upon that decision of the Supreme Court, that this legislation is before us.

93 Cong. Rec. 2306 (1947). Section 2 of the Act dealt with existing claims. It relieved employers from all liability under the FLSA for any activity that occurred before the enactment of the Portal Act unless the activity was compensable pursuant to contract or custom. 29 U.S.C. § 252. The sponsors felt that "the best way and the only practicable way . . . to legislate out of existence these portal-to-portal claims was to make the part of our bill which applies to existing claims applicable to the entire 24 hours of the day." 93 Cong. Rec. 2132 (statement of Sen. Donnell). With respect to those claims, "if the activity for which the worker claims compensation was not compensable under a custom or contract, the employee cannot recover minimum wages, cannot recover overtime compensation, cannot recover liquidated damages," *id.* at 2295 (statement of Sen. Cooper), no matter when that activity was performed.

The sponsors of the Act also recognized that "it was necessary to legislate as to the future. If we did not, the same conditions which prevail today would occur again, with all the resulting uncertainty, with all the resulting litigation." *Id.* at 2293 (statement of Sen. Cooper). Thus, they decided to "recommend legislation, addressing itself to the future, the prospect of which would be to prevent a recurrence of the conditions which now confront the country; and . . . to establish for the first time some standards or criteria . . . in determining what activities should be compensable under the act." *Id.* at 2296 (statement of Sen. Cooper). Section 4 of the Act addresses future claims. Unlike Section 2, which applied to all activities throughout the 24 hour period, Section 4 applies "only to the period preceding the beginning of the normal workday and subsequent to the end of the normal workday." *Id.* at 2132 (statement of Sen. Donnell). Within the scheduled workday itself, "[e]very right that a worker has secured under the [FLSA] up to the Mount Clemens decision is preserved to him." *Id.* at 2297 (statement of Sen. Cooper).

There is little question that the primary target of Section 4 was the activity that triggered the perceived crisis in the first place – the compensability under *Mt. Clemens* of the walk from the plant entrance to and from the employee's workstation, where he performs the work he is employed to perform, at the beginning and end of his scheduled shift. Congress clearly intended to exclude that walk from compensable working time in the future. The very fact that walking time is dealt with in a separate subsection apart from all other preliminary and postliminary activities is evidence of its primacy among Congressional objectives. The Senate Report expressly states that the Act excludes "[t]he following

activities outside the workday" from compensable working time:

> [w]alking, riding, or traveling to and from the actual place of performance of the principal activity or activities within the employer's plant, mine, building, or other place of employment, irrespective of whether such walking, riding, or traveling occur on or off the premises of the employer or before or after the employee has checked in or out, [including] walking . . . from the plant gate to the employee's lathe, workbench, or other actual place of performance of his principal activity or activities.

S. Rep. No. 80-48, at 47. Senator Cooper, one of the principal proponents of the bill on the floor of the Senate, stated that "[w]alking, riding or traveling time to the place where the principal activities are performed has been eliminated as a principal activity," 93 Cong. Rec. 2297, and emphasized that "clearly and definitely, as to the future, an employee cannot receive compensation for *any* walking, riding, or travel time to the *actual* place of performance where he begins his *actual* activities." *Id.* (emphasis supplied). The inclusion of the phrase "actual place of performance" in Section 4(a)(1) was meant to emphasize that the walking to which the section refers is the employee's walk to and from "the actual place where he does what he is employed to do." 29 C.F.R. § 790.7(c). The actual place where a Barber Foods employee does what he is employed to do is his workstation on the production floor. Section 4(a)(1) was intended to exempt from compensable working time the walk to and from that point.

Section 4(a)(1) was intended to exclude from compensable working time all walking on the employer's premises before and after "the workday proper, as generally understood in common parlance." 93 Cong. Rec. 2182 (statement of Sen. Donnell) (Section 4 "does not legislate at all with respect to the period of the workday proper, as generally understood in common parlance . . . It does apply to the time spent in walking or traveling up to that point, or after leaving that point.") Numerous references in the legislative history demonstrate that Congress understood the "workday proper, as generally understood in common parlance" to mean an employee's regular, scheduled shift, the period "from whistle to whistle", when he is required to be at his workstation ready to work. *See*, *id.* at 2132 (Section 4 applies to the period "preceding the beginning of the normal workday and subsequent to the end of the normal workday – what might be termed the whistle-to-whistle period.") (statement of Sen. Donnell); *id.* at 2181 ("the regular working day period, the time from the whistle in the morning to the time of the whistle in the afternoon.") (statement of Sen. Donnell); *id.* at 2299 ("in the period of the scheduled workday the committee did not legislate.") (statement of Sen. Cooper); *id.* at 2362 (Section 4 "leaves untouched the workday proper, or what I may roughly term the time between whistle time in the morning and whistle time in the afternoon.") (statement of Sen. Donnell). The "workday proper" in this case, the "normal" workday, the "scheduled" workday, the "whistle-to-whistle period", is the time between when the employees clock in to start their scheduled shift until they clock out to end it. Section 4(a)(1) was intended to exempt from compensable working time "the time spent in walking or traveling up to that point, or after leaving that point." *Id.* at 2182.

E. The First Circuit's Decision is not Contrary to the Continuous Workday Principle.

1. Petitioners argue that the First Circuit's decision is contrary to the 'continuous workday' principle. The argument is as follows: The Portal Act does not affect the computation of hours worked within the workday, during which an employee's compensable time runs uninterrupted except for bona fide breaks. The workday is bounded by the employees' first and last principal activities. Principal activities include all activities which are an integral and indispensable part of those activities. The First Circuit held that the donning and doffing of the clothing involved in this case is an integral part of the employees' principal activities. Therefore, the workday is bounded by these activities and any walking that occurs after donning and before doffing takes place during the workday. Since the walking occurs within the workday, it is outside the scope of the Portal Act and is compensable in accordance with the general principle that once the workday has begun, an employee's compensable time runs continuously throughout that workday except for bona fide breaks.

2. Petitioners contend that this conclusion is compelled by the Court's decision in *Steiner v. Mitchell*, 350 U.S. 247 (1956). This argument would extend *Steiner* far beyond its limited scope. In *Steiner*, the Court held that activities performed either before or after the regular shift are compensable "if those activities are an integral and indispensable part of the [employees'] principal activities . . . and are not specifically excluded by Section 4(a)(1)." *Id.* at 256. *Steiner* involved the application of the provisions of section 4(a)(2), which deals with preliminary and postliminary activities other than walking. The Court did not address the issue of when the workday commences for

purposes of determining the compensability of pre- and post-shift walking under Section 4(a)(1). Indeed, the Court expressly stated that its holding concerning the compensability of pre-and post-shift activities that are "an integral and indispensable part of the [employees'] principal activities" did not include activities which are "specifically excluded by Section 4(a)(1)." To argue, as Petitioners do, that *Steiner* necessarily means that the performance of an employee's first integral and indispensable activity, no matter where or when performed or how long it takes, invariably removes any subsequent walking to the employee's actual workstation before the start of his regular shift from the scope of Section 4(a)(1)'s exemption is to ascribe to the *Steiner* Court an intent to overturn by implication and without discussion the primary purpose of the Portal Act – to exempt from compensable working time an employee's travel between the plant entrance and his workstation, where he performs the specific work he is employed to perform, at the beginning and end of his scheduled shift – even though the Court never mentioned walking time and expressly excluded activities covered by Section 4(a)(1), *i.e.*, walking and traveling, from the scope of its ruling.

3. Petitioners argue that "integral and indispensable" activities and "principal" activities are one and the same for any and all purposes. As the Department of Labor puts it in its *amicus* brief:

> An activity that is an integral and indispensable part of a principal activity is either a "principal activity" under the Portal Act or it is not. It cannot be a principal activity for purposes of determining the compensability of that activity and not a

> principal activity for purposes of determining the compensability of *subsequent* walking.

DOL Br., at 15 (emphasis in original). However, the principle is not as absolute as Petitioners and the Department would have it. The Department's own interpretive regulations clearly contemplate that Section 4(a)(1) may exempt walking to and from "the actual place of performance of the specific work the employee is employed to perform" even if it occurs between compensable donning and doffing. 29 C.F.R. § 790.7(g) n.49. By paraphrasing the language of Section 4(a)(1), while substituting the words "specific work" for the term "principal activity or activities," the regulation clearly equates "principal activity or activities", as used in Section 4(a)(1), with the "specific work" the employee is employed to perform and distinguishes that "specific work" from compensable donning and doffing, thereby acknowledging that donning and doffing of required clothing, even if considered an integral and indispensable part of the employee's principal activities, is not necessarily the principal activity to which Section 4(a)(1) refers, and that the "actual place of performance" referred to in that subsection is the place where the employee performs the specific work he is employed to perform, not the location where he dons and doffs required clothing. In other words, donning and doffing may be an integral part of the principal activity for purposes of determining the compensability of the donning and doffing and not a principal activity for purposes of determining the compensability of subsequent walking under Section 4(a)(1). The Department responds that "[a]t most, this passage could be read to reserve the possibility that there might be some circumstances in which the compensability of donning and doffing would not automatically lead to the conclusion that associated walking

time falls outside the Portal Act." DOL Br., at 20. If this case is not one of those circumstances, it is hard to imagine one that is. The employees must traverse the same path from the plant entrance to the production floor in any event. Normally, that walk would be noncompensable. S. Rep. No. 80-48, at 47 (1947); 29 C.F.R. § 790.7(e), (f)(1). It is difficult to discern why it should be rendered otherwise simply because the employees have picked up and donned some clothing along the way, especially where the time actually spent donning the clothes is minimal.

In *Reich v. IBP*, 38 F.3d 1123 (10th Cir. 1994), the Tenth Circuit upheld a ruling that walking to and from employees' principal work stations was not a compensable activity even though it occurred between compensable donning and doffing. Citing the "considerable flexibility and personal discretion" with regard to when, how, and where employees donned their gear and then proceeded to their work stations, the Tenth Circuit agreed that the donning and doffing activities, even though compensable, did not constitute the first and last principal activities for purposes of determining the parameters of the compensable workday. *Id.* at 1127. *Contra*, *Alvarez v. IBP, Inc.*, 339 F.3d 894, 906-07 (9th Cir. 2003).

Courts have also recognized in other contexts that the performance of the first and last compensable activities of the day do not invariably form the boundaries of the 'continuous workday', within which everything is compensable. In a series of cases involving law enforcement canine unit personnel, courts have almost uniformly denied compensation for commuting time to and from work with trained police dogs even though the commute occurs after the performance of the officers' first compensable activities of the day and before the performance of their last

compensable activities of the day. *See, e.g., Reich v. New York City Transit Authority*, 45 F.3d 646, 650-51 (2nd Cir. 1995); *Bobo v. United States*, 136 F.3d 1465, 1467-68 (D.C. Cir. 1998); *Aiken v. City of Memphis*, 190 F.3d 753, 758 (6th Cir. 1999). In these cases, the plaintiffs typically spent several hours each day pre-and post- shift at their homes caring for their assigned dogs. Every case has found these activities to be integral and indispensable to the plaintiffs' principal activities as law enforcement officers and thus compensable. *See, Reich*, 45 F.3d at 651 ("walking, feeding, training, grooming, and cleaning up are integral and indispensable parts of the handler's principal activities and are compensable work."). Despite finding that these activities are compensable, the courts, with few exceptions, have rejected the argument that these compensable activities necessarily form the boundaries of the compensable workday so as to render the commute compensable because it follows the first and precedes the last compensable activities of the day. The explanation of the court in *Andrews v. DuBois*, 888 F. Supp. 213 (D. Mass. 1995) is typical:

> Although this reasoning makes sense temporally - the transportation of the dogs takes place after the officers have begun their principal duties and ends before they complete them – it nevertheless defies both the plain language of the statute and common sense . . . [T]he Act explicitly states that commuting time is not compensable . . . Moreover, common sense tells us that employees should not be compensated for doing what they would have to do anyway – getting themselves to work.

Id. at 218. Likewise, Section 4(a)(1) expressly excludes from compensable working time the walk to and from the employee's actual place of performance of the principal

activity he is employed to perform at the beginning and end of the day. In this case, the employees would have to walk from the plant entrance to the production floor where they perform this work even if they were not required to wear anything other than their normal street clothes. Common sense dictates that they do not have to be compensated for doing what they would have to do anyway – walk to the production floor – even if that walk may be preceded by compensable donning.

Petitioners will no doubt argue that the canine unit cases are distinguishable because they involve travel between home and work while the present case involves walking entirely on the employer's premises. However, under the logic of their continuous workday argument, this is a distinction without a difference. Petitioners' argument is that the first and last compensable activities of the day invariably form the bounds of the continuous workday, within which everything is compensable. Under this logic, it should make no difference where the activity takes place as long as it is compensable. If one starts to make such distinctions, it is an acknowledgment that the principle is not, in fact, as absolute and invariable as Petitioners would have it. As the canine unit cases illustrate, the first and last compensable activities do not necessarily and invariably, regardless of context, form the boundaries of the compensable workday.

4. The Department of Labor itself has long recognized that the 'continuous workday' does not invariably begin and end with the performance of the first and last compensable activities, regardless of context or circumstances. This recognition is reflected not only in its interpretive regulations, *see* § 790.7(g) n.49, but also in an opinion of the Administrator of the Wage and Hour Division issued long

before the enactment of the Portal Act. *See*, *Report on Hours Worked in Underground Metal Mining*, U.S. Department of Labor, Wage and Hour Division (March 15, 1941), *reprinted in A Bill to Exempt Employers from Liability for Portal-to-Portal Wages in Certain Cases, and for Other Purposes: Hearings on S.70 Before the Subcomm. of the Senate Comm. on the Judiciary*, 80th Cong., 1st Sess. 517 (1947).[4] In that opinion, the Administrator took the position that a miner's compensable workday started when he reported for duty as required at the collar of the mine even though he had previously engaged in compensable work activities at a different location on the employer's premises, explaining as follows:

> [B]efore the miner reports at the collar ready to descend into the mine he may pick up tools, carbide, or a lamp, and he may receive instructions from his superior as to the day's work . . . There appears to be no doubt that the time spent in each of these activities should be construed as "hours worked." However, each of them normally is extremely minor and takes only a moment or two and the total seldom exceeds 2 or 3 to 5 minutes . . .[B]ecause of the extremely minor nature of these operations it would appear unwarranted to state that the working day actually begins with the first such activity and includes all time thereafter . . . It would therefore appear proper to hold that the total time consumed in performing these operations should be considered within hours worked but that the total elapsed time

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4. This opinion is referenced in both the majority and dissenting opinions in *Tennessee Coal*, 321 U.S. at 592-3 n.3, 613.

> from the first such operation should not normally be so considered.

Id., at 523. Thus, the Department itself has long rejected the absolute, bright-line rule urged by Petitioners that the continuous workday must necessarily and invariably, under any and all circumstances, begin and end with the performance of the first and last compensable activities.

5. Petitioners argue that the First Circuit's decision would "create a markedly *discontinuous* workday", Pets. Br. 24 (emphasis in original), and raise the specter that "employees' right to compensation would start and stop repeatedly through the workday as, for example, they walked from one chicken processing station to the next." *Id.*, at 11. Their concern is unwarranted. The decision neither rejects nor violates the 'continuous workday' principle; it simply disagrees with Petitioners as to when that workday begins. The primary purpose of Section 4(a)(1) of the Portal Act was to exempt from compensable working time an employee's travel between the plant entrance and his work station, where he performs the specific work he is employed to perform, at the beginning and end of his scheduled shift. The decision recognizes and furthers that intent. On the other hand, as the First Circuit observed, Petitioners' expansive view of the 'continuous workday' principle – that the workday, for all purposes, invariably begins and ends with the first and last compensable activities, under any and all circumstances and regardless of context – "pushes so far that it threatens to undermine the Portal-to-Portal Act." Pet. App. 10a. This position is contradicted by the express language of the statute, relevant case law, the interpretive regulations, and a long-standing opinion of the Administrator of the Wage and Hour Division. The First Circuit correctly rejected it.

This expansive view of the 'continuous workday' principle would also lead to absurd results. In the absence of any donning, walking from the plant entrance to the production area on the second floor is noncompensable. 29 C.F.R. § 790.7(e), (f)(1). In order for an employee to get to his work station, that path must be traversed in any event. It is difficult to discern why that noncompensable walk should become compensable merely because the employee has donned some required clothing. According to the Petitioners, the first and last compensable activities, no matter how minimal or when or where performed, form the boundaries of the "workday" within which the provisions of the Portal Act do not apply. Under this view, an employee who is required to wear only a hardhat and who picks that hardhat up and dons it at the plant entrance must be paid for his walk to his workstation while another employee who works right beside him but is not required to wear a hardhat need not be paid for that same walk. Post-shift, Barber Foods' employees doff their clothing at various points en route from the production floor to the plant exit. Some employees drop their items in the first bin right outside the production floor while others use the last bin before the plant exit. Under the rule urged by Petitioners, the employee who drops her items in the first bin ends her compensable workday at that point while the employee who walks by her and does not discard her items until the last bin next to the plant exit gets paid for the entire walk. What if the maintenance personnel place the first or last bin 50 feet further up or down the hall on any particular day? Has the compensable workday lengthened or shortened by that amount? Such distinctions make no sense. As the First Circuit recognized, the position advanced by Petitioners "threatens to undermine Congress's purpose in the Portal-to-Portal Act, which (with rare exceptions) sought to exclude preliminary and postliminary waiting and walking time from compensability." Pet. App. 10a.

F. The Walking Time at Issue is not Integral and Indispensable to the Employees' Principal Activities

The previous section discussed the flaws in Petitioners' argument that the walking time in this case is compensable because it is part of the 'continuous workday'. Petitioners also argue that the walking time is integral and indispensable to the employees' principal activities and thus is compensable regardless of whether it occurs during the workday.

The walking in this case is necessitated by the fact that the plant entrance is on the first floor and the production area is on the second floor. Some of the walking may take place after donning and before doffing, but the same path to and from the production floor must be traversed in any event. In the absence of any pre-shift donning, the walk from the plant entrance to the work stations on the production floor clearly would be noncompensable. 29 C.F.R. § 790.7(e), (f)(1). It does not make any difference that the walk is necessary in order to be able to perform the employees' principal activities or undertaken solely for the employer's benefit. Those are the reasons that the walk from the plant entrance to the work stations was held to be compensable work in *Mt. Clemens* and that holding was the precise target of Section 4(a)(1) of the Portal Act. "Walking, riding, or traveling time to the place where the principal activities are performed has been eliminated as a principal activity." 93 Cong. Rec. 2297 (statement of Sen. Cooper)

The only possible argument in favor of the compensability of any portion of this walk is that the "actual place of performance of the principal activity or activities which such employee is employed to perform" is located someplace before the employees' work stations. Petitioners

argue that is the case here. According to Petitioners, donning is the first principal activity and the place of performance of that activity is the initial distribution station. Even so, the walk from the plant entrance to that location is clearly excluded by Section 4(a)(1). With respect to the walk from that point to the production floor, its compensability depends entirely upon the premise that the donning activities are the "principal activity or activities which [the] employee is employed to perform," referred to in Section 4(a)(1), the performance of which starts the compensable workday and following which everything is compensable. If they are not, the actual place of performance of the principal activities is the production floor – it cannot be elsewhere – and walking to that point "has been eliminated as a principal activity" by Section 4(a)(1). In other words, although differently labeled, Petitioners' 'integral and indispensable' argument is virtually indistinguishable from and entirely dependent upon their 'continuous workday' argument, the flaws of which have already been discussed.

III. The Time that Employees May Spend Waiting in Line to Obtain Required Clothing and Equipment is not Compensable under Section 4(a)(2) of the Portal Act

The First Circuit ruled that the time that employees may spend in line waiting to obtain their clothing and equipment is not compensable. Observing that "the Code indicates that a reasonable amount of waiting time is intended to be preliminary or postliminary", the court of appeals held that "a short amount of time spent waiting in line for gear is the type of activity that the Portal-to-Portal Act excludes from compensation as preliminary." Pet. App. 12a. This holding was correct.

1. The interpretive regulations clearly contemplate that a reasonable amount of waiting time was intended to be noncompensable preliminary activity. Examples include "checking in and out and waiting in line to do so" and "waiting in line to receive paychecks." 29 C.F.R. § 790.7(g). Another regulation specifically states that "checking in and out and waiting in line to do so would not ordinarily be regarded as integral parts of the principal activity or activities." *Id.* § 790.8(c). The examples given in the interpretive regulations are meant to be illustrative, not exclusive. As the First Circuit stated, "while the Code does not explicitly address the type of waiting time at issue, the Code indicates that a reasonable amount of waiting time is intended to be preliminary or postliminary." Pet. App. 12a.

The Department reads the regulations to mean only that when the wait is connected with a preliminary activity, rather than with a principal activity, the wait itself is generally considered preliminary as well. DOL Br. 29. However, there is no meaningful distinction in fact or logic between waiting in line to check in and punch a time clock and waiting in line to obtain required clothing and equipment. Both occur before the employee proceeds to the production floor where he performs the work he is employed to perform and in either case, if there is a wait, the time is generally not spent primarily for the convenience of the employee. In Petitioners' view, this would be enough to make them both integral and indispensable to the principal activity. Yet, the regulations provide that waiting in line to check in should normally be considered preliminary activity. Consistent with the general intent evidenced by the regulations, that a reasonable amount of waiting time may be considered noncompensable preliminary activity, there is no reason to treat waiting in line to obtain clothing and equipment any differently.

2. Petitioners contend that any waiting involved in obtaining clothing and equipment is compensable because the employees are "engaged to wait." Waiting time is compensable work under the FLSA when an employee is "engaged to wait" rather than waiting to be engaged. *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944). Generally, an employee is considered to be engaged to wait when the "time is spent predominantly for the employer's benefit," *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944), and cannot be used effectively for the employee's own purposes. 29 C.F.R. § 785.15. The 'engaged to wait' principle recognizes that although work generally had been defined as including "physical or mental exertion", an employer could also hire an employee to be on call or to be available on the worksite at a specific time to wait for work. This principle has little application to the facts of the present case. Barber Foods employees are not required to arrive at any specific time *before* the start of their scheduled shift. The only requirement is that they be at their workstations wearing the required gear when the shift begins[5] and even this requirement is flexible, with employees being allowed a twelve-minute 'swing period' to clock in. Depending upon when they arrive at the plant and when they decide to obtain their gear, some employees may experience a short wait to obtain their gear while others do not have to wait at all.

In any event, it is not enough to say that the waiting time is compensable work under the FLSA. An activity may be considered "work" and still be a noncompensable preliminary or postliminary activity. The categories of "work" and noncompensable preliminary activities are not mutually exclusive. In other words, the fact that an activity may

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5. Barber Foods does not question that any waiting time after this point would be compensable.

constitute "work" under the *Tennessee Coal* definition does not mean that the activity must be either a principal activity or integral to a principal activity. The explicit purpose of Section 4(a) of the Portal Act was to relieve employers from the obligation to compensate employees for certain preliminary and postliminary activities that would otherwise be compensable and the only reason they would otherwise be compensable is if they constituted "work." *See* 29 C.F.R. § 790.4(a)(1):

> The primary Congressional objectives in enacting section 4 [were] to minimize uncertainty as to the liabilities of employers which it was felt might arise in the future if the compensability under the [FLSA] of such preliminary or postliminary activities should continue to be tested solely by existing criteria for determining compensable worktime.

Id. § 790.2(a) (The Act "contemplates that employers will be relieved, in certain circumstances, from liabilities . . . to which they might otherwise be subject under the [FLSA]"). *Id.* § 790.4(a) (Section 4 "relieves the employer from certain liabilities . . . to which he might otherwise be subject under the provisions of the [FLSA]"). Thus, even if the minimal waiting time involved in this case can be considered "work", it can still be a noncompensable preliminary activity.

The First Circuit agreed, stating that "[e]ven if we were to find that the employees were engaged to wait under the FLSA and its accompanying regulations, the waiting time would qualify as preliminary or postliminary activity under the Portal-to-Portal Act." Pet. App. 11a. Petitioners argue that the waiting time must be an integral and indispensable activity because, according to them, it is necessary, is

controlled by and directly benefits the employer, and is closely related to the donning activities. Pets. Br. 37-38. Leaving aside whether all of these characterizations are accurate given the considerable flexibility and personal discretion built into the process, the fact that certain pre-shift activities are necessary and benefit the employer does not automatically transform those activities from noncompensable preliminary activities into compensable integral and indispensable activities. Inherent in the very nature of preliminary activities is that they are a necessary prerequisite to the performance of the principal activities and are obviously of some benefit to the employer. To say that any activity which is necessary to the performance of the principal activity and done for the benefit of the employer, which is the *Tennessee Coal* definition of work, cannot be a preliminary activity but must necessarily be an integral and indispensable part of the principal activity, is in effect to transpose the criteria for determining "work" under the FLSA onto the criteria for determining the compensability of preliminary activities under the Portal Act, even though an express purpose of Section 4 of the Act was to create a category of noncompensable preliminary activities that would not be governed by the "existing criteria for determining compensable worktime." 29 C.F.R. § 790.4(a)(1). It would also ensure that every activity that qualifies as "work" must also be deemed integral and indispensable to the principal activity leaving the preliminary category to cover only those activities which do not qualify as "work" in the first place. Congress did not need to enact the Portal Act to accomplish that result, because if the activity is not "work", it is not compensable under the FLSA in any event. Petitioners' argument, which would render Section 4(a)(2) of the Portal Act superfluous, should be rejected.

3. The reality of the workplace is that except for the smallest of employers, it is impossible for all employees to arrive at the place of employment, punch a time clock, and be at their workstations ready to work at exactly the same time, without varying degrees of waiting time. Depending upon when they arrive at the plant, some may have to wait at the time clock and others may not. The situation is similar in this case with regard to obtaining required clothing and equipment. Some employees arrive early, pick up their clothes, and then go to the cafeteria to socialize; some don their clothes before going to the cafeteria, some after; some go to the lockers and don their clothes there, others do not use lockers; some don their clothes as soon as they retrieve them, some don them in the cafeteria, others don them right before entering the production floor, others don them along the way. Some arrive at the plant early and some arrive at the last possible minute. Depending upon when they arrive and the order in which they engage in these activities, some may wait in line to obtain their gear while others do not wait at all. The only requirement is that they be on the line ready to go when the shift starts, and even as to that requirement the employees are allowed up to twelve minutes of "swing time", meaning they can punch in up to six minutes early and get paid for that time or up to six minutes late without incurring an attendance violation. It was circumstances such as these, where employees have considerable flexibility and personal discretion in their personal routines and may vary individually, and from day to day, in the order in which they engage in these activities, and in which the time spent on such activities itself varies from one day to the next, that led the court in *Reich v. IBP, Inc.* to deny the compensability of waiting and walking time associated with compensable

donning and doffing. 38 F.3d at 1127. As this Court stated in *Mt. Clemens*, in addressing waiting time at time clocks:

> [I]t would have been impossible for all members of a particular shift to be checked in at the same time in view of the rate at which the time clocks were punched . . . It would be manifestly unfair to credit the first person with . . . more working time than credited to the last person due to the fortuitous circumstances of his position in line.

328 U.S. at 690. Similarly, it is impossible for all employees to pick up their gear at the exact same time, and it would be manifestly unfair to credit employees with more or less working time due to the fortuitous circumstance of their position in line. It is in recognition of these realities of the workplace that a reasonable amount of pre-shift waiting time is considered noncompensable preliminary activity.

4. Petitioners respond that the employer is in control of how it organizes its operations and can avoid these uncertainties and potential liabilities by moving the distribution stations to a location beyond the time clocks. True, if necessary, Barber Foods could do that. But how would that benefit anyone? This option would necessarily entail establishing a clock-in time as close to the start of production as possible and prohibiting employees from clocking-in early[6], inevitably resulting in more time waiting in line to punch the time clocks than is now spent waiting in line to obtain gear. The walk would be the same – from the plant entrance to the time clocks at the entrance to the

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6. Petitions acknowledge that "[n]othing prevents an employer such as respondent from requiring employees to arrive at the donning area at a specific time shortly before the start of the shift, don their equipment, and proceed immediately to the floor." Pets. Br. 33.

production floor – and would clearly be noncompensable. 29 C.F.R. § 790.7(e), (f)(1). Any waiting time would be at least as much, and likely more, than is presently the case, the only difference being that any waiting time would be concentrated at the time clocks, which is clearly noncompensable, *id.* §§ 790.7(g); 790.8(c), rather than at the distribution stations. The employees would lose much of the flexibility and discretion they now enjoy without any discernible effect on the total walking and waiting time involved, and that walking and waiting time would clearly be noncompensable.

Applying Petitioners' reasoning, the company could make slight adjustments affecting the compensability of any waiting time without making any difference in the total time it takes an employee to punch the time clock and obtain his gear. Take, for example, rotating associates, who comprise the bulk of the workforce. A rotating associate is required to war a lab coat, hairnet, earplugs, and safety glasses. The earplugs and safety glasses are dispensed once and replaced as needed. The same could easily be done with hairnets, dispensing a couple weeks supply in one handful. The earplugs, safety glasses and hairnet could be taken home, carried to work in the employee's pocket, and required to be put on only after donning the lab coat. This leaves the lab coat as the only item that would have to be obtained every day at the plant. The coat racks could then be moved to immediately in front of the time clocks or immediately behind them. The difference in placement would be a matter of a few feet at most. The total time spent waiting in line to either first take a coat off the rack and then punch the time clock, or to first punch the time clock and then take a coat off the rack is virtually the same. The waiting time, if any, is occasioned by the bottleneck created when employees queue

up to perform the first activity in the sequence. According to Petitioners, the waiting time in the first scenario is compensable because it is integral to the principal activity of obtaining required clothing while the waiting time in the second scenario is noncompensable because the employee is waiting to punch a time clock. Such distinctions make no sense.

Barber Foods can restructure its operations to avoid uncertainties and potential liabilities. However, as noted by IBP in the companion case (No. 03-1238), "these decisions would be driven not by a legitimate concern for efficiency, but by an artificial effort to avoid liability for walking [and waiting] time Congress never intended to make compensable." IBP Br. 33. Through years of experimentation and trial and error, the company has arrived at a process that best meets the needs of the employer and the wishes and convenience of the employees. Upsetting this balance that has been mutually arrived at over time would benefit neither the employees nor the employer.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

Abdela Tum *et al.*,

Petitioners,

v.

Barber Foods, Inc., d/b/a Barber Foods,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

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REPLY BRIEF FOR THE PETITIONERS

This case presents the question whether petitioners are entitled to full compensation for the time they spend each day complying with respondent's requirement that they wear special clothing and equipment to protect the quality of respondent's food products and avoid expensive workplace accidents. Respondent has argued that although it is required to pay for the time petitioners spend putting on and taking off the clothing and equipment, it is not required to pay for the time petitioners spend walking between and waiting at equipment stations or the time spent walking between the stations and the factory floor. There is nothing in the Portal Act that requires this incongruous result.

The briefing has narrowed the dispute in this case to two essential questions: (1) whether the donning and doffing of required safety gear is a "principal activity," within the meaning of Section 4 of the Portal Act, 29 U.S.C. 251 *et seq.*, and (2) whether, even if donning and doffing are not principal activities in themselves – but rather, as respondent claims, a compensable non-principal activity – the walking and waiting associated with donning and doffing are nonetheless compensable as a part of that compensable donning and doffing process. As described in petitioners' opening brief, donning and doffing *are* part of petitioners' principal activities at Barber Foods and, in any event, are part and parcel of an activity this Court has already held compensable under the Portal Act. Respondent's arguments to the contrary do not withstand scrutiny.

I. Petitioners' Walking And Waiting Time Is Compensable Because Donning And Doffing Required Safety Equipment Is Part Of Petitioners' Principal Activities.

Walking and waiting are ubiquitous during the workday. Office workers walk from cubicles to supply rooms, court reporters wait during breaks in a trial, factory workers walk between positions on a production line and sit in idleness

waiting for the production line to be repaired. See 29 C.F.R. 785.15. No one disputes that such walking and waiting time is compensable during the workday notwithstanding the Portal Act. See, *e.g.*, *Tum* Resp. Br. 36 & n.5. The walking and waiting time in this case is no different. It occurs during the workday, which begins and ends with the donning and doffing of petitioners' required safety gear, the first and last "principal activity or activities" of the day.

A. The Critical Dispute In This Case Is Whether Donning And Doffing Are Part Of Petitioners' Principal Activities

For all the pages of briefing, the actual dispute in this case is quite narrow. As just noted, the parties in this case and in *IBP* v. *Alvarez*, No. 03-1238, all agree that the Portal Act does not apply to activities that occur during the workday. See *Tum* Resp. Br. 8, 21; *Alvarez* Pet. Br. 11-12. The parties further agree that the workday is defined by the first and last principal activity of the day. See *Tum* Resp. Br. 15; *Alvarez* Pet. Br. 15-16.[1] This agreement is unsurprising – on its face Section 4 of the Act applies only to activities "which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." Section 4(a).[2]

The critical dispute, instead, is whether petitioners' "principal activity or activities" encompass donning and doffing or instead, as respondent argues, are exclusively limited to "processing chicken, not donning and doffing

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[1] No party in either case supports the view of the concurrence below that a principal activity commences the workday only if it requires more than a *de minimis* amount of time to complete. That argument lacks merit for the reasons described in petitioners' opening brief at 41-49.

[2] This conclusion is also amply supported by the legislative history and Department of Labor regulations. See Pet. Br. 15-17.

clothing and equipment." *Tum* Resp. Br. 7. If petitioners are right, there can be no dispute that they are entitled to compensation for the walking and waiting time at issue in this case. That is, if donning and doffing are part of petitioners' principal activities, then the work day begins and ends in the donning areas, starting with the commencement of the donning process and ending with the completion of doffing the required clothing and equipment at the end of the day. The walking and waiting occurs during the workday, thus defined, and accordingly falls outside the scope of Section 4.

On the other hand, if respondent is right about the scope of petitioners' "principal activities," the workday begins and ends on the production floor, starting when the chicken processing commences and ending when the production line stops. On that view, the travel between the donning/doffing areas and the production floor would seemingly be excluded from compensation under Section 4(a)(1) because it would constitute "walking * * * to and from the actual place of performance of [petitioners'] principal activity" outside of the workday. Likewise, the walking and waiting during the donning process would appear to constitute a "preliminary to or postliminary to said principal activity" within the meaning of Section 4(a)(2).[3]

In arguing that donning and doffing are not principal activities, the employers do not dispute that in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), this Court held that

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[3] Ironically, in order to square their interpretation of "principal activity" with *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), the employers are compelled to take the position that even if activities fall outside the scope of the workday – and would therefore seemingly constitute non-compensable "preliminary" or "postliminary" activities – they may yet be compensable if they are "integral and indispensable" to the workers' principal activities. See *Tum* Resp. Br. 26; *Alvarez* Pet. Br. 17-18. As explained in Section II, *infra*, if this Court adopts that view, and holds that donning and doffing are not "principal activities," petitioners would still prevail.

indistinguishable donning and doffing was "an integral part of and indispensable to [workers'] principal activities" and, for that reason, fell outside the scope of the Portal Act's presumption against compensability. 350 U.S. at 255. The disagreement, instead, is over whether such "integral and indispensable" activities constitute part of the workers' "principal activities," as petitioners argue, or whether, as the employers assert, "integral and indispensable" activities constitute a distinct category of compensable work that falls outside the scope of the employees' "principal activities."

B. *Steiner* Held That Donning And Doffing Are Principal Activities

As petitioners explained in their opening brief (at 18-21), this Court already resolved that dispute in *Steiner*. The donning and doffing in that case was held compensable notwithstanding the Portal Act precisely because this Court concluded that these preparatory activities were within the scope of the employees' principal activities.

The employers in this case, however, offer a very different interpretation of *Steiner*. Whereas petitioners argue that the Court interpreted "principal activities" to *include* all activities that are an integral and indispensable part thereof, the employers argue that the Court created a new category nowhere mentioned in the statute: "integral and indispensable" activities that are neither "principal" nor "preliminary"/"postliminary," (or, perhaps, activities that *are* "preliminary"/"postliminary," but are nonetheless compensable). See *Tum* Resp. Br. 26; *Alvarez* Pet. Br. 17-18. Although this interpretation is impossible to square with the text of the statute, the employers insists that it *must* be the interpretation this Court embraced in *Steiner* because the alternative reading of the case would lead to an unacceptable construction of "principal activities." *Tum* Resp. Br. 25; *Alvarez* Pet. Br. 18-19. The employers are wrong on every point.

1. Language Of The Opinion

The opinion in *Steiner* makes the basis for the decision abundantly clear. At the beginning of the decision, the Court announced that the "precise question" before the Court was "whether workers in a battery plant must be paid *as a part of their 'principal' activities* for the time incident to" changing clothes at the plant or instead "whether these activities are 'preliminary' or 'postliminary' within the meaning of the Portal-to-Portal Act and, therefore, not to be included in measuring the work time for which compensation is required." 350 U.S. at 248 (emphasis added). There was no mention of a third possibility – that the clothes changing could be compensable *even if* it was undertaken preliminary or postliminary to the workers' actual principal activities, so long as it was "integral and indispensable." Certainly no party in the case took that position. The Government argued, and the lower courts accepted, that the clothes changing was compensable because "the term 'principal activity or activities' in Section 4 embraces all activities which are an 'integral and indispensable part of the principal activities,' and that the activities in question fall within this category." *Id.* at 252-53 (footnote omitted); see also *id.* at 249 (Government argued that clothes changing was compensable because it was "part of" the workers' principal activities); *id.* at 252 (district court held that clothes changing was integral and indispensable and was, "therefore, included among the principal activities of said employees"). The employer, on the other hand, insisted that "integral and indispensable" activities were noncompensable precisely because they "fall without the concept of 'principal activity.'" *Id.* at 251.

Because all parties agreed that the clothes changing was "integral and indispensable," the only question before this Court in *Steiner* was whether the Government was right that such activities are part of the workers' principal activities or whether the employer was right that they are not. That, of course, is precisely the same question posed in this case.

In *Steiner*, the Court's answer was unequivocal – the clothes changing was compensable because it was "an integral and indispensable *part of* the principal activities for which covered workmen are employed and [was] not specifically excluded by Section 4(a)(1)," 350 U.S. at 256 (emphasis added). In concluding that the integral and indispensable act of clothes changing was "part of" the workers' principal activities, the Court relied on a Department of Labor regulation that likewise provided that "[t]he term 'principal activities' includes all activities which are an integral part of a principal activity," and legislative history that adopted the same definition. 29 C.F.R. 790.8 (cited at 350 U.S. at 255 n.9).

The employers insist that this cannot be the holding of *Steiner*, for it results in an interpretation of "principal activity" that is, in their view, far too broad. See *Tum* Resp. Br. 25; *Alvarez* Pet. Br. 18-19. The term "principal activity," they assert, is much narrower, encompassing only the employees' "most important" or "chief" duty undertaken on "the production floor" during "an employee's regular, scheduled shift * * * when he is required to be at his workstation ready to work." *Tum* Resp. Br. 15, 23. See also *Alvarez* Pet. Br. 15. This interpretation is so clearly right, the employers argue, that the Court could not possibly have rejected it. *Tum* Resp. Br. 25; *Alvarez* Pet. Br. 18-19.

But it did. The employer in *Steiner* advanced precisely the same interpretation of "principal activity," arguing that clothes changing fell outside "the concept of 'principal activity'" because it was "performed off the production line and before or after regular shift hours." 350 U.S. at 251-52. Had this Court accepted that interpretation of "principal activity" in *Steiner*, the employer would have won the case.

2. Opinion's Rationale

The employers insist that this is not true, that the employees won in *Steiner* by convincing the Court to hold that donning and doffing safety clothing was compensable

even though it was not a principal activity itself. See *Tum* Resp. Br. 24-25; *Alvarez* Pet. Br. 17-18. As shown above, that conclusion finds no support in the Court's opinion in *Steiner*. Moreover, the interpretation of the Portal Act the employers ascribe to *Steiner* is completely implausible, flying in the face of the plain language of the Act itself.

If, as the employers must argue, the only principal activity in *Steiner* was making car batteries, then the clothes changing in that case was clearly "preliminary" and "postliminary" within the meaning of the Portal Act, because it occurred before and after the work on the factory floor. There's nothing in the statute, or in common sense, to support the view that an activity that occurs before and after the workers' principal activities could be anything but "preliminary to or postliminary to said principal activity." Section 4(a)(2). Nor is there anything in the Act that supports the employers' hypothesized third category of activity that occurs prior to a worker's principal activities, but that is nonetheless not "preliminary" within the meaning of the Act, or that is "preliminary" but nonetheless compensable.

Respondent cannot explain how the Court could have nonetheless upheld the workers' claims in *Steiner*. IBP does little more, suggesting only that this Court relied on the legislative history to justify the invention of a new category of compensable activities having no connection to the text of the statute, reflecting the Court's "methodology [of statutory construction] of the time." *Alavarez* Pet. Br. 29. That suggestion is baseless. It was just as well established in 1954 as it is today that "[t]he plain words and meaning of a statute cannot be overcome by a legislative history." *Ex parte Collett*, 337 U.S. 55, 61 (1949). The Court in *Steiner* was true to that principle, looking first to the statutory text but finding it ambiguous, then turning to other traditional sources to resolve the ambiguity. This Court applies the same methodology today, as does IBP in its brief to this Court. Compare 350 U.S. at 254 ("The language of Section 4 is not free from ambiguity and the legislative history of the Portal-

to-Portal Act becomes of importance."), *id.* at 253 (reviewing congressional purposes), and *id.* at 254-55 (reviewing subsequent amendments and regulations) with *Alvarez* Pet. Br. 13-15 (text), *id.* 20-29 (legislative history and purposes), and *id.* 30-32 (regulations).

3. Unsuccessful Attempts To Distinguish Steiner

In addition to attempting to re-characterize the holding of *Steiner*, the employers also advance various supposed distinctions between that case and this one, none of which makes any difference.

First, the employers note that *Steiner* did not fully decide the question before the Court in this case. *Steiner* did not, for example, "address the issue of when the workday commences." *Tum* Resp. Br. 8. See also *Alvarez* Pet. Br. 17. That is true, but the parties themselves agree that the workday commences with the first principal activity. The critical dispute is over whether donning and doffing required equipment is such a principal activity, and *Steiner* does decide *that* question.

The employers also point out that *Steiner* did not involve a claim for compensation for walking, which is specifically addressed by Section 4(a)(1). See *Tum* Resp. Br. 8; *Alvarez* Pet. 19. That, too, is true but irrelevant. Petitioners do not rely on *Steiner* to fully establish their right to compensation for walking time. Instead, they rely on *Steiner* only to establish that donning and doffing are part of petitioners' principal activities; petitioners' right to compensation for walking time follows easily from there under the plain terms of the Portal Act. The Act exempts from compensation only walking to and from the place of the "actual place of performance of the principal activity" which "occur[s] either prior to the time on any particular workday at which said employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." Section 4(a)(1). Thus, the provision's applicability turns again on the definition of "principal

activity." If donning and doffing are principal activities, then the walk to which Section 4(a)(1) refers is the walk between the factory gate and the equipment areas, not the walk between the equipment areas and the factory floor.[4]

The employers also note that in describing its holding, the Court in *Steiner* stated that activities are compensable if they "are an integral and indispensable part of the principal activities for which the workmen are employed *and are not specifically excluded by Section 4(a)(1)*." 350 U.S. at 256 (emphasis added). But this caveat has no application to petitioners' argument that their walking time is compensable because it occurs during the workday. That argument depends on *donning and doffing* being considered a principal activity, not on walking itself meeting the "integral and indispensable" test of *Steiner*. That is, under this argument the walking is compensable because it occurs during the workday (which starts with donning and ends with doffing), not because walking is itself an "integral and indispensable" part of petitioner's principal activities.

4. Congressional Acceptance Of Steiner*'s Holding*

As discussed below, *Steiner*'s interpretation of "principal activity" was manifestly correct. But even if respondent had made a persuasive case that *Steiner* misconstrued the Act, there would be no basis for applying a different definition of "principal activities" in this case. No party explicitly argues that *Steiner* was wrongly decided and none asks this Court to overrule it, for good reason. Almost fifty years have passed since the decision and *Steiner*'s construction of the Act has become settled law. Congress has had ample opportunity to narrow *Steiner*'s interpretation of "principal activity," but has not done so even though it has subsequently amended other

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[4] For that reason, petitioners seek compensation only for the time spent walking between various equipment stations, and between the donning/doffing areas and the factory floor, not for the walk between the factory gate and the equipment areas.

aspects of the Portal Act. See, *e.g.*, Pub. L. No. 93-259, § 6(d)(2)(A), 88 Stat. 61 (Apr. 8, 1974); Pub. L. No. 89-601, Title VI, § 601, 80 Stat. 844 (Sep. 23, 1966). "With respect to such a longstanding and well-known construction of [a] statute, and where Congress made substantive changes to the statute in other respects, we presume, absent any indication that Congress intended to alter [the interpretation], that Congress 'adopted that interpretation' when it reenacted [the] statute." *Ankenbrandt* v. *Richards*, 504 U.S. 689, 700 (1992) (citations omitted).

C. The Statutory Language, Legislative History And Purposes, And The Interpretive Regulations All Support The Conclusion That Donning And Doffing Are Part Of Petitioners' Principal Activities.

This Court's interpretation of "principal activities" in *Steiner* was, in any event, correct. Respondent argues that the phrase "principal activity" was intended to encompass only an employee's "'chief' or 'most important'" activity, which in this case, respondent says, "is processing chickens." *Tum* Resp. Br. 15. Consequently, the employers argue, the workday is limited to "the employee's regular, scheduled shift, the period from 'whistle to whistle,' when he is required to be at his workstation ready to work." *Id.* 22. See also *Alvarez* Pet. Br. 11 (Portal Act excludes "pre- and post-shift" activities such as "walking to and from the work stations"). That interpretation is wrong.

1. Statutory Language

The term "principal activity or activities" is intentionally broad and generic, ensuring that employees receive compensation for bona fide work benefiting their employers in the myriad work environments to which the statute applies. By using the plural "activities," Congress made clear that the phrase is not limited to a single "most important" activity, as respondent asserts (*Tum* Resp. Br. 15). There can be little

doubt that donning and doffing required safety equipment is among the most important duties petitioners perform as part of their employment. The equipment is worn primarily for the benefit of the employers, to ensure the cleanliness and quality of their food products and to prevent serious workplace injuries that could disrupt operations and impose substantial costs on the companies. If petitioners did not take the time to don and doff it, Barber Foods and IBP simply could not operate.

2. Legislative History And Purpose

The legislative history is also incompatible with the employers' insistence that "integral and indispensable" activities are not part of an employee's "principal activities," and that the statutory term excludes pre- and post-shift preparatory activities like donning and doffing.

As noted in *Steiner*, the Senate Report expressly provided that "[t]he term 'principal activity or activities' *includes* all activities which are an integral part thereof." S. Rep. No. 80-48, at 48 (1947) (emphasis added). To illustrate the definition of "principal activity," the Senate Report gives two examples: a lathe operator preparing his tools before the start of his shift and a garment worker distributing materials before production begins for the day. *Ibid.* During the Senate debates, Senator Cooper, a sponsor of the Act, repeated the definition from the Senate Report and applied it to two other examples: a worker required to arrive at work a half-hour before his shift to sharpen tools, 93 Cong. Rec. 2350 (1947), and workers required to don protective clothing before commencing their productive activities in a chemical plant, *id.* at 2297-98. In each of these examples, the employee was engaged in pre-shift preparatory activities that could not be considered part of the worker's principal activities under the definition advanced by the employers in this case. Yet, in every instance, the legislative history indicates that the pre-shift activity was compensable precisely because it is a part of the employee's principal activity or activities. See S. Rep. No. 80-48, at 48

(1947) (garment worker's pre-shift activities "are among the principal activities of such employee"); 93 Cong. Rec. 2350 (1947) (Sen. Cooper) (pre-shift tool sharpening compensable "as part of the principal activity"); *id.* at 2298 (Sen. Cooper) ("In accordance with our intention as to the *definition of 'principal activity,'* if the employee could not perform his activity without putting on certain clothes, then the time used in changing into those clothes would be compensable *as part of his principal activity.*" (emphasis added)).

There is no doubt that the Act was intended to revise the compensation rule created by *Anderson* v. *Mount Clemens Pottery Co.*, 328 U.S. 680 (1946). But this legislative history demonstrates that the employers are wrong in claiming that "Congress intended *all* pre- and post-shift walking to be uncompensated except pursuant to contract, custom or practice." *Alvarez* Pet Br. 21. If Congress had intended to accomplish that goal, it would have defined the workday in terms of the employees' shifts, rather than in terms of "principal activities," a general phrase that has no inherent reference to time or place. Indeed, there was good reason for Congress to decline to define "principal activities" by reference to the beginning and ending of the employee's shift or to limit it to activities taking place at the worker's "workstation" or any other particular location. Defining the workday in accordance with the employer-established shift or workplace would predictably lead to strategic manipulation by employers seeking to expand the scope of Portal Act's exemption from compensation. Indeed, a prior version of the bill created precisely this risk by limiting the scope of Section 4 to activities that took place outside the "scheduled workday," defined in the Senate Report as the period of the day made "compensable by contract." S. Rep. No. 80-37, at 44 (1947); see also *id.* at 47-48. The bill was amended, however, to excise any reference to the employer's schedule or the employment contract, using instead the generic legal phrase "principal activity or activities." S. Rep. No. 80-48, at 47 (1947). And, as discussed above, Congress clearly

understood that phrase to encompass pre- and post-shift preparatory activities like donning and doffing.

3. Regulations

Like this Court's decision in *Steiner* and the Senate Report, the Department of Labor regulations also define "principal activity" to "include[] all activities which are an integral part of a principal activity." 29 C.F.R. 790.8(b). Moreover, while the employers argue that principal activities may only occur during the workers' shift, the regulations conclude that "Congress intended the words 'principal activities' to be construed liberally • • • to include any work of consequence performed for an employer, *no matter when the work is performed*." *Id.* § 790.8(a) (emphasis added). The regulations repeat the examples of pre-shift activities defined as "principal" in the legislative history, and conclude that "[s]uch preparatory activities, which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act, regardless of contrary custom or contract." *Id.* § 790.8(b).

No party challenges the correctness or validity of any of the Portal Act regulations and, indeed, the employers themselves rely on them. See *Tum* Resp. Br. 16-18; *Alvarez* Pet. Br. 30-32. The employers recognize, of course, that the Department of Labor has construed those regulations as supporting the workers' claims in this case. They nonetheless make the implausible claim that the Department of Labor has fundamentally misconstrued its own regulations.

To make that claim, the employers are forced to ignore the regulation that defines "principal activity" and the bulk of the regulations which, as petitioners' established in their opening brief (at 21-24), support the Department of Labor's position in this case. The employers ignore, for example, the regulation that provides that travel is compensable as part of a day's work when it is preceded by activities such as "report[ing] to a meeting place to receive instructions • • • or to pick up tools." 29 C.F.R. 785.38. Under the employers'

theory, receiving instructions or picking up tools would, at most, be "integral and indispensable" activities that could not start the workday and the subsequent travel would, therefore, fall outside the workday and be rendered noncompensable by the Portal Act. Yet the regulations require compensation for the travel because it occurs "during the workday." *Ibid.*

Instead, the employers rely principally on a single ambiguous and inconclusive footnote, asserting that it establishes a principle that is directly contradicted by the body of the regulations and the plain text of the Portal Act. See *Tum* Resp. Br. 17-18 (citing 29 C.F.R. 790.7(g) n.49); *Alvarez* Pet. Br. 30-31 (same). As petitioners explained in their opening brief (Pet. Br. 34-35 n.19), the intended meaning of footnote 49 is far from clear. On its face, the footnote reaches no conclusion about the compensability of time spent traveling between a clothes-changing location and the place of the performance of a principal activity. But the question left open by the footnote has since been answered by the Department of Labor through its enforcement actions in other cases and its briefs to this Court in this case. See *Alvarez* DOL Br. 23-25. As demonstrated above, that answer is amply supported by the body of the regulations and by the text of the Portal Act. Like the employers' interpretation of *Steiner*, their reading of footnote 49 results in an interpretation of the Portal Act that is simply incompatible with the plain text of the statute. There is no way to read Section 4(a) to require compensation for donning and doffing unless that activity is deemed part of the employees' principal activities. And if that is true, then the walking and waiting at issue in this case, and the walking hypothesized in footnote 49, must occur during the workday and outside the scope of the Portal Act.

D. Incongruous Consequences Arise From Respondent's, Not Petitioners', Interpretation Of The Portal Act.

The employers' interpretation of the Portal Act leads to a series of incongruous results, discussed in petitioners' opening brief. Pet Br. 22-26. The responses of Barber Foods to these arguments, and its attempt to show that petitioners' interpretation would lead to absurd results, are unpersuasive.

1. As described in petitioners' opening brief (Pet. Br. 22-24), Congress intended the Portal Act to preserve the "continuous workday rule," a long-standing principle of compensation under the FLSA that generally requires employers to pay employees for all the time they spend on duty at their place of employment. Respondent does not deny that its construction of the Portal Act results in employees' right to compensation starting and stopping repeatedly as workers proceed from one equipment station to the next and between the equipment stations and the production line. Instead, respondent denies that the discontinuity is inconsistent with the continuous workday principle, pointing to the previously discussed footnote 49, a Department of Labor opinion letter that pre-dates the Portal Act, and a series of lower court cases involving police dog handlers. *Tum* Resp. Br. 24-32.

Petitioners have already discussed footnote 49. The conflict between respondent's reading of the footnote and the continuous workday rule is yet another reason not to adopt respondent's interpretation. The 1941 letter requires little comment, since because it was written long before the Portal Act and, if read as respondent would have it, contradicts the Department's interpretation embodied in its extensive post-Portal Act regulations and the text of the Act itself.

The canine unit examples are also unavailing. In those cases, canine officers sought compensation for commuting time on the ground that it occurred during their workday. That workday, the officers argued, began when they fed the

dogs at home prior to driving to work. Respondent argues that accepting petitioners' view of the Portal Act and the continuous workday rule would compel the Court to hold that these officers are entitled to pay for ordinary commuting time, and that the solution is to conclude that the workday does not commence with an "integral and indispensable but not principal" activity such as feeding a dog. That argument fails for two reasons.

First, respondent's reading of the Act does not solve the problem it identifies. There are undoubtedly many occasions on which an employee is required, prior to her commute to work, to perform an activity that even respondent would concede is a "true" principal activity. For example, a police officer scheduled for an afternoon shift may be required to appear in court for an hour in the morning, after which she will return home and then drive to work several hours later to begin her shift. Respondent's theory that only a true principal activity can start the workday would not solve the commuting time problem in this scenario if the officer claimed a right to compensation for her commute to work later that day, since the pre-commute event was clearly a true principal activity.

The commuting question is resolved by a proper application of the continuous workday principle, not through a contortion of the Portal Act. While it is true that the Portal Act does not apply to activities that occur between the first and last principal activities of the day, this does not mean that all time during this period is compensable. The continuous workday regulation itself creates important exceptions. That regulation provides that the "workweek ordinarily includes 'all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place.'" 29 C.F.R. 785.7 (citation omitted). Thus, the rule does not apply when an employee is off-duty or to periods during which "an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes." *Id.* § 785.16(a). Consequently, ordinary commuting does not fall within the

continuous workday rule because the off-duty employee is not "on the employer's premises, on duty or at a prescribed work place." *Id.* § 785.7. See also *id.* § 785.35 ("Normal travel from home to work is not worktime.").

By contrast, no exception to the continuous workday rule justifies the erratic starting and stopping of the time clock proposed by respondent in this case. While there are undoubtedly unconventional work arrangements for which application of the continuous workday rule may be difficult,[5] petitioners' is not among them. Petitioners seek compensation for time that is part of an ordinary contiguous workday, time during which they are "required to be on the employer's premises, on duty or at a prescribed work place.'" 29 C.F.R. 785.7. The Portal Act was not intended to interrupt compensation during such ordinary workdays.

2. Respondent also argues that petitioners' interpretation of the Act would lead to a series of absurd results, most of which have already been thoroughly discussed in the prior briefs. See, *e.g.*, Pet. Br. 32-34; *Alvarez* DOL Br. 26-30. One, however, warrants an additional response.

Respondent argues (*Tum* Resp. Br. 40-42) that any ruling in petitioners' favor would be of no consequence, because respondent could rearrange its donning and doffing process to avoid petitioners' claims for compensation. This would be accomplished, respondent says, through eliminating the wait at the equipment cages by dispensing "a couple of weeks supply" of the disposable equipment at a time, and by distributing the rest of the equipment on the factory floor. *Id.* 41. This argument actually serves to illustrate two of the points petitioners made in their opening brief.

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[5] The regulation itself provides that basic continuous workday rule applies "ordinarily," leaving open the possibility for a different rule in unusual circumstances. The Department of Labor has attempted to deal with some common forms of atypical work arrangements through specific regulations. See, *e.g.*, 29 C.F.R. pt. 785.

First, respondent concedes that there is no practical impediment to implementing petitioners' interpretation of the Portal Act by placing time clocks at the entrance to the donning and doffing areas. *Tum* Resp. Br. 40 ("True, if necessary, Barber Foods could do that."). Second, respondents' argument merely illustrates that respondent could make its equipment distribution process more efficient – by, for example, eliminating the wait at the equipment cages by distributing a week's worth of supplies at a time – but has chosen not to do so because it bears none of the costs of the inefficiencies.

Respondent asserts (*Tum* Resp. Br. 40) that any gain in efficiency would be offset by respondent's right to insist that workers arrive for work even earlier and wait in long lines to clock in. One would hope that employers would not intentionally arrange their clocking-in process to inflict undue wait time on their employees, and respondent's right to do so is limited. See 29 C.F.R. 790.7(g) (waiting to clock in is preliminary only "when performed under the conditions normally present"). Accordingly, one would expect that the general consequence of ruling in petitioners' favor would be an increase in the efficiency of donning and doffing processes generally, to the greater social good. However, even if this did not occur, it would not change the text of the Portal Act, this Court's holding in *Steiner*, or the regulations.

II. The Walking And Waiting Time In This Case Is Part Of The Donning And Doffing Process This Court Held Compensable In *Steiner*.

Even if this Court accepted the employers' interpretation of *Steiner* and held that donning and doffing are *non*-principal compensable activities, petitioners would still prevail. Surely *Steiner* contemplated compensation for the entire donning and doffing process in that case – including waiting to receive new clothes, walking from the clothing distribution points to the locker room and from the lockers to the showers and back – not just for the moments in which the workers were putting

on and taking off the clothing. The walking and waiting during the process is no less integral and indispensable to the employee's principal activities than are the clothes changing moments themselves. To hold otherwise would create a completely unadministrable rule of compensation, one an employer could implement only with a stopwatch.

Respondent does not contest that the walking and waiting time during the donning and doffing process is "necessary, is controlled by and directly benefits the employer, and is closely related to the donning activities." *Tum* Resp. Br. 37-38. That is precisely the definition of an "integral and indispensable" activity employed in *Steiner*. See 350 U.S. at 252. Respondent nonetheless argues that the walking time is not truly integral to the donning and doffing process because, given the layout of the particular plant in this case, the workers would have to traverse the same route even if they were not donning and doffing clothes and equipment along the way. *Tum* Resp. Br. 33. This is not precisely accurate – respondent admits that some additional walking is required during the donning process, for example to retrieve items from the locker room, *id.* 3, 39 – and surely is not true generally. Moreover, the rule suggested by respondent's point would be completely unadministrable, requiring employers to pay workers for the actual moments spent donning and doffing (some of which may occur while the employee is walking down the hall), but not for the time spent walking between the stations, unless the employee's path deviates from the one she would have taken if she had not been required to pick up the required gear.[6]

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[6] Respondent also argues that the walking is excluded by Section 4(a)(1) because it constitutes travel to the place of performance of petitioners' principal activities (in respondent's view, the production floor). But even under respondent's interpretation, walking between equipment stations is not walking to the factory floor and would, therefore, fall outside the scope of Section 4(a)(1).

With respect to the time spent waiting for equipment, respondent argues that "a reasonable amount of waiting time was intended to be noncompensable preliminary activity." *Tum* Resp. Br. 35. But, as petitioners noted in their opening brief (Pet. Br. 39-40), the regulations specifically state that a worker is entitled to compensation for time spent waiting for a compensable activity to begin, 29 C.F.R. 790.7(h), and during delays that occur in the midst of a compensable activity, *id.* § 785.15. Unlike time spent waiting to clock in, time spent waiting for required safety equipment occurs during the midst of a compensable process and is an inextricable part of that activity.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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